TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 288.

GEORGE A. KIBBE, PLAINTIFF IN ERROR,

vs.

SAMUEL DITTO AND AMOS DUNN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 18, 1873.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, on Wednesday, the twenty-third day of April, in the March term of said court, in the year of our Lord one thousand eight hundred and seventy-three, and of our Independence the ninety-seventh year.

WILLIAM H. BRADLEY, *Clerk.*

GEORGE A. KIBBE
vs.
SAMUEL DITTO AND AMOS DUNN. } 10274. Ejectment.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that, on the 20th day of March, A. D. 1872, came George A. Kibbe, plaintiff, by his attorneys, and filed in the office of the clerk of the circuit court of the United for said district, at Chicago, in the district aforesaid, his declaration in ejectment against
2 Samuel Ditto and Amos Dunn, defendants, with a notice, affidavits, and bond for costs thereto attached; which said declaration, notice, affidavits, and bond are respectively in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

United States circuit court, March term, 1872.

George A. Kibbe, who is a citizen of the State of Massachusetts, by Rodolphus K. Turner, his attorney, complains of Samuel Ditto and Amos Dunn, who is a citizen of the State of Illinois, in a plea of trespass and ejectment.

For that whereas heretofore, to wit, on the first day of January, in the year eighteen hundred and seventy-two, (A. D. 1872,) at and within the county of Mercer and said State of Illinois, the said plaintiff was possessed as of his demesne in fee-simple of that certain tract or parcel of land, with the appurtenances, situate in the county of Mercer, in the said State of Illinois, and described as follows, to wit:
3 The southeast quarter of section nineteen (19) in township thirteen (13) north of the base-line, and in range three (3) west of the fourth principal meridian; which said premises exceed in value the sum of five hundred dollars, and which the said plaintiff claims in fee-simple. And the said plaintiff being so possessed thereof, the said defendant afterwards, to wit, on the same day and year last aforesaid, entered into said premises, and ejected the said plaintiff therefrom, and from the time last aforesaid ha unlawfully withheld, and do now unlawfully withhold, from the said plaintiff the possession thereof, to the damage of said plaintiff of the sum of five hundred dollars; therefore he brings this suit, etc.

RODOLPHUS K. TURNER,
Atty. for Plaintiff.

To Samuel Ditto and Amos Dunn, the above-named defendants:

You are hereby notified that the declaration, with a copy of which you are now herewith served, and to which this notice is attached, will be filed in the circuit court of the United States for the northern

4 district of Illinois, on the fifteenth day of the March term thereof, A. D. 1872, or as soon thereafter as counsel can be heard, and that upon filing the same a rule will be entered requiring you to appear and plead to the said declaration within twenty days after the entry of said rule; and that, if you neglect so to appear and plead, a judgment by default will be entered against you, and the plaintiffs will recover possession of the premises specified in said declaration.

Dated this 4th day of March, A. D. 1872.

RODOLPHUS K. TURNER,
Atty. for Plaintiff.

STATE OF ILLINOIS, *Adams County, ss:*
United States circuit court, March term, A. D. 1872.

GEORGE A. KIBBE
vs.
SAMUEL DITTO AND AMOS DUNN. } In ejectment.

H. T. Patten, being duly sworn, deposes and says that he did,
5 on the 4th day of March, A. D. 1872, personally serve Samuel Ditto, one of the defendants in this suit, who was in the actual occupation and possession of the premises for which this action was brought, with a true copy of the declaration hereunto annexed, and also a true copy of the notice in writing to the said declaration subjoined, and likewise hereunto annexed, by leaving the same with Margaret Ditto, wife of said defendant, at the dwelling-house of said defendant, she being a white person of ten years of age and upwards, and a member of said defendant's family; he being absent. And further deponent saith not.

H. T. PATTEN.

Subscribed and sworn to before me this 9th day of March, A. D. 1872.
[NOTARIAL SEAL.] L. E. EMMONS,
Notary Public.

6 STATE OF ILLINOIS, *Adams County, ss:*
United States circuit court, March term, A. D. 1872.

GEORGE A. KIBBE
vs.
SAMUEL DITTO AND AMOS DUNN. } In ejectment.

H. T. Patten, being duly sworn, deposes and says that he did, on the 4th day of March, A. D. 1872, personally serve Amos Dunn, one of the defendants in this suit, who was in the actual occupation and possession of the premises for which this action was brought, with a true copy of the declaration hereunto annexed, and also a true copy of the notice in writing tot he said declaration subjoined, and likewise hereunto annexed; and further this deponent saith not.

H. T. PATTEN.

Subscribed and sworn to before me this 9th day of March, A. D. 1872.
[SEAL.] L. E. EMMONS,
Notary Public.

UNITED STATES OF AMERICA,
Northern District of Illinois:

Circuit court, March term, A. D. 1872.

7 GEORGE A. KIBBE
vs.
SAMUEL DITTO AND AMOS DUNN. } In ejectment.

I enter myself as security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and, in default of payment by the plaintiff of any costs ordered or adjudged to be paid by said plaintiffs, hereby agree and stipulate that execution may issue against my property for any costs taxed against said plaintiff.

RODOLPHUS K. TURNER.

Dated this 1st day of March, A. D. 1872.

(Indorsed:) Filed March 20th, 1872. Wm. H. Bradley, clk.

On this day, to wit, the 20th day of March, in the March term, A. D. 1872, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, United States district judge of said district, appears the following entry, to wit:

8 GEORGE A. KIBBE
vs.
SAMUEL DITTO & AMOS DUNN. } Ejectment.

Now comes the plaintiff, by his attorney, who files his declaration in ejectment against the defendants, together with a notice thereto attached, and also an affidavit of due service of a true copy of said declaration and notice upon the defendant, and, on motion of the plaintiff's attorney, it is ordered that said cause be docketed and the defendants ruled to plead within twenty days, or that their defaults be entered.

On this day, to wit, the 5th day of April, A. D. 1872, said defendants, by their attorneys, filed in said clerk's office their plea in said entitled cause, which said plea is in words and figures following, to wit:

Plea.

United States circuit court, northern district of Illinois, March T., A. D. 1872.

SAMUEL DITTO & AMOS DUNN
ads.
GEORGE A. KIBBE.

9 And now come the said defendants, by Miller, Frost & Lewis, their attorneys, & say that they are not guilty of unlawfully withholding possession of the premises described in the declaration as in said declaration alleged, & as to this said defendants put themselves upon the country, &c.

MILLER, FROST & LEWIS,
Attys. for deft.

(Indorsed:) Filed April 5, 1872. Wm. H. Bradley, clk.

On this day, to wit, the 18th day of April, in the March term, A. D. 1873, of said court, before the Hon. James C. Hopkins, judge, in the record of the proceedings thereof in said entitled cause appears the following entry, to wit:

GEORGE A. KIBBE
v.
SAMUEL DITTO ET AL. } Ejectment.

Now come the parties, by their attorneys, and, upon issue joined thereupon, come a jury of good and lawful men, to wit: August England, Alexander Osterman, Reuben Prescott, E. B. Baker, W. H.
10 Whitton, Milton H. Miller, L. B. King, C. H. Little, B. F. Webb, B. Beach Fellows, Peter Markley, and Darwin Ruger, who were all duly elected, tried, and sworn well and truly to try said issue, and, after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

Afterwards, to wit, on the 19th day of April, in the March term, A. D. 1873, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. James C. Hopkins, judge, appears the following entry, to wit:

GEORGE A. KIBBE
vs.
SAMUEL DITTO ET AL. } Ejectment.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empanneled and sworn, and after hearing the concluding evidence, the hour of adjournment having arrived, the further trial of the same is postponed to Monday.

11 Afterwards, to wit, on the 21st day of April, in the March term, A. D. 1873, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. James C. Hopkins, judge, appears the following entry, to wit:

GEORGE A. KIBBE
vs.
SAMUEL DITTO ET AL. } Ejectment.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empanneled and sworn, and after hearing a part of the arguments of counsel, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

Afterwards, to wit, on the 22d day of April, in said March term, A. D. 1873, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. James C. Hopkins, judge, appears the following entry, to wit:

GEORGE A. KIBBE
vs.
SAMUEL DITTO ET AL. } Ejectment.

12 Now come again the parties, by their attorneys, and now come also the jury in this behalf empanneled and sworn, and after hearing the concluding arguments of counsel and receiving the instructions of the court, the jury retired to consider of their verdict, and after

a short absence the jury returned into court the following verdict, to wit: We, the jury, find the defendants not guilty.

Afterwards, to wit, on the 23d day of April, in said March term, A. D. 1873, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. James C. Hopkins, judge, appears the following entry, to wit:

GEORGE A. KIBBE
vs.
SAMUEL DITTO AND AMOS DUNN. } Ejectment.

Now comes the plaintiff, by his attorney, and moves the court for a new trial herein, and the court being now fully advised thereon overrules said motion. It is thereupon considered and adjudged by
13 the court that the defendants be discharged and go hence without day, and that they have and recover of the plaintiff their costs in this behalf, expended about their defence in this behalf, amounting to the sum of ten dollars and seventy-five cents, and that they have execution therefor.

On the hearing of said cause the following exceptions were taken, and were allowed by the court and made of record, and are in the words and figures following, to wit:

14 *Bill of exceptions.*

United States circuit court, northern district of Illinois, March term A. D. 1873.

GEORGE A. KIBBE
vs.
SAMUEL DITTO & AMOS DUNN. } Ejectment.

Be it remembered that on the trial of the issue in this *in this* case, before a jury, the plaintiff, to maintain the issue on his part, read in evidence the following title-papers and deposition, to wit:

1. A patent issued by the United States to Benjamin Bailey, granting the land described in the declaration in fee-simple, and dated November 29th, 1817.

2. A certified copy of a deed, dated March 9th, 1818, executed by Benjamin Bailey to Nathaniel Abbot, conveying the same land in fee, recorded Nov. 23, 1818.

3. A certified copy of a power of attorney, dated July 14, 1820, made by Nathaniel Abbot to Abraham Beck, authorising him to sell and convey certain lands, and among them the tract in controversy in
15 this suit, recorded July 30, 1821.

4. A certified copy of a deed, dated September 12, 1820, executed by Nathaniel Abbot, by Abraham Beck, his attorney in fact, to William M. O'Hara, conveying in fee sixty-two quarter-sections of land in the millitary-bounty tract in Illinois, and among them the land described in the declaration, which was recorded in Pike County, May 9, 1821; fourty-four of said quarter-sections in this deed being described in the two mortgages hereinafter mentioned.

5. A deposition of Helen O'Hara Harrel, in which it is proved that William M. O'Hara died in Missouri in the summer of 1821, intestate,

leaving Susan O'Hara his widow, and Susan O'Hara, Charles O'Hara, James William O'Hara, and Helen O'Hara, (the witness,) his only children born in lawful wedlock; that Susan O'Hara, the widow, died in the spring of 1822; that Susan O'Hara, the daughter, was born about A. D. 1814, and died intestate in A. D. 1838, without ever having been married, and never having had any child. Charles O'Hara was born A. D. 1816, & died in A. D. 1836 intestate, not having been mar-
16 ried & never having had any child; and that James William O'Hara was born in 1818, and died intestate in A. D. 1837, not having been married & never having had any child; and also that the witness was four or five years old when her mother died, and was married to Abram D. Harrel September 23rd, A. D. 1840, who was a commander in the U. S. Navy, and who died December 16, A. D. 1871, at Washington, D. C.

6. A deed, dated May 2, A. D., 1868, executed by Abram D. Harrel and Helen O'Hara Harrel to George A. Kibbe, the plaintiff, conveying the land described in the declaration, with others, in fee.

And thereupon the plaintiff rested.

The defendants then, to maintain the issue on their part, offered in evidence the following instrument of writing, being a certified copy, to wit:

No. 20.—Wm. M. O'Hara to J. P. Cabbame.

This deed, made this day of September, in the year of our Lord one thousand eight hundred and twenty, witnesseth: That William M. O'Hara & Susan O'Hara, his wife, of the town of St. Louis, in the
17 county of St. Louis and Territory of Missouri, for and in consideration of five thousand and ninety-three dollars to them in hand paid by John P. Cabanne, of St. Louis, aforesaid, the receipt whereof the said William M. O'Hara and Susan O'Hara do hereby acknowledge, do grant, bargain, and sell unto the said John P. Cabbanne, his heirs and assigns forever, fifty tracts of land containing one hundred and sixty acres each, all situated in the county of Madison, in the State of Illinois, between the Illinois and Missouri Rivers, and more particularly described as follows, to wit: The northwest quarter of section seventeen, in township No. five, of range No. two west; the southeast quarter of section No. thirty-six, in township No. fifteen north, of range No. three west; the southeast quarter of section No. twenty-seven, in township No. thirteen north, of range No. one west; the northeast quarter of section No. twenty-seven, in township No. fourteen north, of range No. four east; the northeast quarter of section No. thirty-two, in township No. thirteen north, of range No. eight east; the northwest quarter of section No. twenty-seven in township No. eleven north, of range No. seven east; the northeast quarter of section No. eleven, in town-
18 ship No. two north, of range No. seven west; the southwest quarter of section No. thirty-five, in township No. eight north, of range No. six west; the northeast quarter of section No. thirty-five, in township No. three north, of range No. five west; the northwest quarter of section No. five, in township No. thirteen north, of range No. four east; the southeast quarter of section No. twenty, in township No. twelve north, of range No. one west; the southeast quarter of section No. twenty-nine, in township No. twelve north, of range No. seven east; the northeast quarter of section No. twenty-nine, in township No. thirteen north, of range No. nine east; the northeast quarter of section No. thirty-one, in township No. twelve north, of range No. three west; the

northwest quarter of section No. twenty-four, in township No. fourteen north, of range No. four west; the northeast quarter of section No. twenty-four, in township No. eleven north, of range No. six east; the northeast quarter of section No. thirty-six, in township No. seven north, of range No. two west; the southeast quarter of section No. thirty-one, in township No. seven north, of range No. four east; the southeast
19 quarter of section No. twenty-four, in township No. five north, of range No. three west; the southwest quarter of section No. twenty-eight, in township No. ten north, of range No. four west; the southeast quarter of section No. two, in township No. four north, of range No. six west; the southwest quarter of section No. twenty, in township No. thirteen north, of range No. three west; the southwest quarter of section No. thirty-six, in township No. six north, of range No. seven west; the southeast quarter of section No. seven, in township No. six north, of range No. six west; the southeast quarter of section No. twenty, in township No. nine north, of range No. three west; the northwest quarter of section No. twenty-three, in township No. nine north, of range No. five west; the southwest quarter of section No. twenty-seven, in township No. three north, of range No. five west; the southwest quarter of section No. thirty-six, in township No. eleven north, of range No. one west; the northwest quarter of section No. twenty-nine, in township No. two north, of range No. four west; the southeast quarter of section No. seven, in township No. five north, of range No. seven west; the northeast quarter of section No. fifteen, in township No. five north, of range No. eight west;
20 the southeast quarter of section No. twenty-nine, in township No. eleven north, of range No. three east; the southwest quarter of section No. twenty-nine, in township No. six south, of range No. three west; the northeast quarter of section No. twenty-seven, in township No. five north, of range No. six west; the northeast quarter of section No. fourteen, in township No. eleven north, of range No. three west; the northwest quarter of section No. seventeen, in township No. two south, of range No. four west; the northeast quarter of section No. thirty-six, in township No. eleven north, of range No. six east; the northwest quarter of section No. thirty-six, in township No. eleven north, of range No. six east; the northeast quarter of section No. thirteen, in township No. three north, of range No. seven west; the northwest quarter of section No. thirteen, in township No. three north, of range No. seven west; the southeast quarter of section No. nineteen, in township No. thirteen north, of range No. three west; the northeast quarter of section No. six, in township No. four north, of range No. two west; the southwest quarter of section No. seven, in township No. six north, of range No. six west; the northeast quarter of section No. eleven,
21 in township No. nine north, of range No. four west; the southwest quarter of section No. twenty nine, in township No. seven north, of range No. (3) three west; the northeast quarter of section No. twenty-five, in township No. seven north, of range No. two west; the northeast quarter of section No. four, in township No. twelve north, of range No. three east; the southwest quarter of section No. twenty, in township No. eight north, of range No. two west; the southwest quarter of section fifteen, in township No. six north, of range No. three east; the southeast quarter of section No. twenty-five, in township No. three north, of range No. two east.

To have and to hold the above-described fifty tracts of land, with the appurtenances, unto the said John P. Cabanne, his heirs and assigns forever; provided always, and it is mutually agreed by and between the

parties to this deed, that if the said William M. O'Hara and Thomas Collett, or either of them, shall pay or cause to be paid to the said John P. Cabanne, his heirs and assigns, the first and full sum of five thousand and ninety-three dollars and thirty-three cents, agreeably to the terms of three promissory notes made and executed this day by
22 the said William M. O'Hara and Thomas Cotter to the said John P. Cabanne, each of which promissory notes is for the sum of one thousand six hundred and ninety-seven dollars and seventy-eight cents, and payable, one note at seven months after date, one at ten months after date, and one at twelve months after date, then this deed shall be void and of no effect, anything herein contained to the contrary notwithstanding.

In witness whereof the said William M. O'Hara and Susan O'Hara have hereunto set their hands and seals the day and year first hereinabove written.

WM. M. O'HARA. [SEAL.]
SUSAN O'HARA. [SEAL.]

Signed, sealed, and delivered in the presence of—
The word "notes," in the 1st line, 3d page, interlined before signing and sealing.
J. C. SANNY.

STATE OF MISSOURI, *ss:*

Be it remembered that on the day of the date hereof, before the undersigned, a notary public of the State aforesaid, duly commissioned, residing in the town of St. Louis, personally appeared William M. O'Hara and Susana his wife, who acknowledged the foregoing
23 instrument of writing to be *there* act and deed for the purposes therein mentioned; and the said Susan*d*, wife of the said William M. O'Hara, being by me examined separately and apart from her said husband, doth make her free and voluntary acknowledgement that she is well acquainted with the contents of the said deed, and executed the same free from the compulsion or under the influence of her said husband.

In testimony whereof I have hereunto set my hands and affixed my notariel seal at St. Louis aforesaid, this third day of October, A. D. 1820.

J. V. GARNER, *N. P.*

Recorded 21st Feb'y, 1821.

STATE OF ILLINOIS, *County of Pike, ss:*

I, Joseph J. Topliff, clerk of the circuit court, and by law recorder in and for the county of Pike and State of Illinois, do hereby certify that the above and foregoing is a true copy of an instrument of writing and the acknowledgment thereto, as appears of record in vol. 1 of deed records, on pages 12, 13, and 14, as the same was recorded Feb'y
24 21st, A. D. 1821, and now is.

Given under my hand, and the seal of the said court hereunto affixed, at Pittsfield, in said county and State, this 16th day of September, A. D. 1872.

[SEAL.] JOS. J. TOPLIFF, *Clerk.*

[5 ct. U. S. int. rev. stamp—cancelled.]

The interlineation of "as the same was recorded Feb'y 21st, A. D. 1821, and now is," made Oct. 29th, A. D. 1872, by

JOS. J. TOPLIFF, *Clk.*

To the reading of which the plaintiff objected, because it was not proved or acknowledged so as to entitle the defendants to read it in evidence, and because a certified copy is not evidence, making, however, no objection for the want of foundation; but the court overruled the objection and allowed it to be read, which was accordingly done; and the plaintiff excepted.

The defendants then offered in evidence the following instrument of writing as auxiliary to the record hereafter offered, to wit:

25 No. 102.—Wm. O'Hara to J. P. Cabaune.

This indenture, made this thirteenth day of April, in the year of our Lord one thousand eight hundred and twenty-one, between William M. O'Hara and Susan O'Hara his wife, of St. Louis, in the State of Missouri, of the first part, and John P. Cabaune, of the place aforesaid, of the second part, witnesseth that the said parties of the first, as well to secure the payment of the sum of five thousand and ninety-three dollars and thirty-four cents, agreeable to the tenor of three promissory notes given by William M. O'Hara and Thomas Collet to the said John P. Cabaune or order, each of which notes is for the sum of sixteen hundred and ninety-seven dollars and seventy-eight cents, dated on the day of 1820 and payable at seven, ten, and twelve months after date, as also for and in consideration of the sum of one dollar, by the said party of the second part to the said parties of the first part in hand paid at and before the time of sealing and delivering these presents, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said party of the second part, his heirs and assigns, sixteen tracts or parcels of
26 land, containing one hundred and sixty acres each, situate in the tract appropriated for military bounties in the State of Illinois, more particularly described as follows, to wit: The southwest quarter of section No. twelve, in towns No. five north, of range No. seven west; the southeast quarter of section No. twenty-six, in town No. three north, of range No. seven west; the northeast quarter of section No. four, in town No. three north, of range No. six west; the northwest quarter of section No. nine, in town six north, of range No. five east; the southeast quarter of section No. eleven, in No. ten north, of range No. six east; the northwest quarter of section No. seventeen, in town No. five north, of range No. three east; the southeast quarter of section No. fifteen, in town No. six north, of range No. eight west; the northwest quarter of section No. thirty-three, in town No. twelve north, of range No. one west; the northwest quarter of section No. fifteen, in town No. one north, of range No. two west; the northwest quarter of section No. five, in town No. two north, of range No. eight west; the southeast quarter of section No. nine, in town No. thirteen north, of range No. three east; the northwest quarter of section No. fif-
27 teen, in town No. thirteen north, range No. nine east; the northwest quarter of section No. eleven, in town No. fourteen north, of range No. eight east; the northwest quarter of section No. three, in town No. three north, of range No. six west; the southwest quarter of section No. fifteen, in town No. three north, of range No. eight west; the southeast quarter of section No. fourteen, in town No. eleven north, of range No. four west. To have and to hold the said sixteen tracts of land above described, with all and singular the privileges and advantages to the same belonging or in any wise appertaining, to him, the said party of the second part, his heirs and assigns forever, to his and their

only proper use and benefit; provided always, and it is hereby agreed by and between the parties to these presents, that if the said William M. O'Hara and Thomas Collett, or either of them, shall pay or cause to be paid to the said John P. Cabanne, or to his order, the said sum of five thousand and ninety-three dollars and thirty-four cents, agreeably to the tenor of the three promissory notes hereinbefore recited, then this indenture and everything therein contained shall be null and void, anything hereinbefore contained to the contrary notwithstanding.

28 In witness whereof the said William M. O'Hara and Susan O'Hara have hereunto set their hands and seals the day and year first hereinbefore written.

WM. M. O'HARA. [SEAL.]
SUSAN O'HARA. [SEAL.]

Signed, sealed, and delivered in presence of—
P. PROVENCHIN.

The word "north" interlined before signing.

J. V. GARNIER.

STATE OF MISSAURE, *ss*:

Be it remembered that on the day of the date hereof, before, Joseph V. Garnier, a notary public of the State of Missaure, duly commissioned, residing in the town of St. Louis, personally appeared William M. O'Hara and Susan O'Hara his wife, and acknowledged the foregoing instrument of writing to be their act and deed for the purposes therein mentioned; and the said Susan, wife of the said William M. O'Hara, being by me examined separately and apart from her husband, doth make her acknowledgment that she is well acquainted with the contents of the said deed, and hath executed the same free from the compulsion or undue influence of her said husband.

29 In testimony whereof I have hereunto set my hand and affixed my notariel seal at St. Louis, this thirteenth day of April, 1821, and of the independence of the United States the forty-fifth.

[SEAL.] J. V. GARNEER, *N. P.*

Recorded 9 May, 1821.

STATE OF ILLINOIS, *County of Pike:*

I, Joseph J. Topliff, clerk of the circuit court, and ex officio recorder in and for the last aforenamed county and State, do hereby certify that the foregoing four pages is a true copy of an instrument of writing, with the acknowledgment thereto, as appears of record in vol. one of deed records, on pages 80 & 81, in this office, and the date of the records thereof.

Given under my hand, and the seal of said court hereunto affixed, at my office in Pittsfield, in said county of Pike and State of Illinois, this 17th day of September, A. D. 1872.

[L. S.] JOS. J. TOPLIFF, *Clerk.*

[5 ct. U. S. int. rev. stamp cancelled.]

30 To the reading of which the plaintiff objected, because it was not proved or acknowledged so as to entitle the defendants to read it in evidence, and it was immaterial, the land in controversy not being described in it; but the court allowed the instrument to be read in evidence, and the plaintiff excepted.

The defendants then offered in evidence the following certified copies, to wit:

At a circuit court begun and holden at Cole's Grove, within and for the county of Pike, on Monday, the twenty-third day of April, one thousand eight hundred and twenty-two:

Present, the hon'ble Joseph Phillips, chief-justice.

The sheriff of the county returned a panel of grand jurors, which being called over, sixteen of them appeared and were sworn agreeably to law, viz: John Shaw, foreman; Garret Van Dusen, John Wood, Rufus Brown, Jeramiah Rose, David Eveland, Nathaniel Shaw Jona-
31 than Simonds, Thomas Church, Wilham Metz, Jacob Metz, Daniel Shin, Barnabas Haynes, Thomas R. Brashear, Nathaniel Hinkley, and Jacob Fenner. John G. Curtiss sworn to take charge of the grand jury.

Afterwards, to wit, on the same day, the following orders were made and entered of record, which said orders are in the words and figures following, to wit:

DANIEL C. BOSS, COMPLAINANT,
vs.
JOHN ADAMS AND ELIZABETH, HIS WIFE, DEFENDANTS. } Chancery.

It appearing to the court that the defendants in this cause are not inhabitants of this State, and they not having answered the complainant's bill, it is ordered by the court that they file their answers to said bill with the clerk of this court on or before the first day of the next October term of said , or that said bill will be taken for confessed against them. And it is further ordered that a copy of this order be published three weeks successively in the Edwardsvile Spectator.

32 ROBERT SIMPSON, COMPLAINANT,
vs.
SUSAN O'HARA AND OTHERS, DEFENDANTS. } In chancery.

JOHN P. CABANNA, COMPLAINANT,
vs.
SAME, DEFENDANTS. } In chancery.

Ordered that the same notice be given in the two last cases as in the one immediately foregoing.

At a circuit court begun and holden at Cole's Grove, within and for the county of Pike, on Monday, the seventh day of October, one thousand eight hundred and twenty-two:

Present, the hon'ble John Reynolds, judge.

Afterwards, to wit, on the same day, the following order was made and entered of record, which said order was in the words and figures following, to wit:

JOHN P. CABANNE, COMPLAINANT,
vs.
SUSAN O'HARA AND OTHERS, DEFENDANTS. } Bill in chancery.

33 This day came the complainant, by his counsel, and it appearing to the court that the order made at the last term for the appearance of the defendants in this cause has been published three weeks successively in the Edwardsville Spectator, as required by said order,

and the defendants not having entered their appearance herein, or answered the bill of complaint, on motion of the complainants counsel, it is ordered by the court that said bill be and the same is hereby taken for confessed against them. And it appearing to the satisfaction of the court that there is due to the complainant the sum of five thousand four hundred and sixty-two dollars and twenty cents by virtue of the three promissory notes and indentures of mortgage mentioned and set forth in the bill of complaint, being the principal and interest due on those notes—

It is therefore ordered, adjudged, and decreed by the court, that the defendants pay to the complainant the said sum of five thousand
34 four hundred and sixty-two dollars and twenty cents, on or before the twentieth day of November next, together with the costs of this suit, to be taxed by the clerk; and on such payment being made that the complainant deliver up to the defendants to be cancelled the two deeds of mortgage set forth in the bill; but on failure, neglect, or omission of the defendants to pay said sum of five thousand four hundred and sixty-two dollars and twenty cents to the complainant on or before the said twentieth day of November next, then, and in that case, it is further ordered, adjudged, and decreed by the court that the said defendants and each of them be forever barred and foreclosed from all equity of redemption of, in, and to the mortgaged premises mentioned in the bill of complaint, and every part and parcel thereof.

And it is further ordered, adjudged, and decreed by the court that all and singular the several and respective mortgaged premises
35 mentioned and described in the complainant's bill of complaint, with the appurtenances, being sixty-six quarter-sections of land, be separately sold at public auction to the highest bidder. And for the purpose of carrying this decree into execution it is further ordered and decreed by the court that Henry Starr be, and he is hereby, appointed a commissioner to make sale of said mortgaged premises as soon as may be convenient after the twentieth day of November next, at the court-house in the town of Edwardsville, in the county of Madison, giving three weeks' previous notice of the time of such sale in the Edwardsville Spectator, published in said town, and also by placing a like notice on the door of said court-house, and that he execute a deed or deeds to the purchaser or purchasers thereof, and that with the monies arising from such sales he pay to the complainant the said sum of five thousand four hundred and sixty-two dollars and twenty cents, with interest thereon at the rate of six per cent. per annum from the date of this decree until paid, if so much there be, and that the residue of said monies,
36 if any there be, he deposit with the clerk of this court, subject to the further order of this *of the* court; and that in case the complainant be the highest bidder, he, the said Henry Starr, take his receipt for the amount of his respective bidds or purchases, and file the same with the clerk of this court and with the papers in this suit, and that he report his proceedings herein at the next term of this court. And it is further ordered, adjudged, and decreed by the court that the defendants in this cause, who are infants, under the age of twenty-one years, have one year after they shall severally arrive to the age of twenty-one years to show cause against this decree.

At a circuit court begun and holden at the town of Atlas, within and for the county of Pike, on the first Thursday after the fourth Monday in the month of April, in the year of our Lord one thousand eight hundred and twenty-three:

Present, the hon'ble Thomas Reynolds, chief justice.

Afterwards, to wit, on the same day of said term of court, the
37 following order was made and entered of record, which said order is in the words and figures following, to wit:

JOHN P. CABANNE
vs.
SUSAN O'HARA, WIDOW, AND OTHERS, THE children and heirs at law of WILLIAM M. O'Hara, deceased, defts. } In chancery.

On reading the report of Henry Starr, commissioner in this cause, of his proceedings herein, under a decree of this court made at the last term, it is ordered by the court that the doings of said Starr, as commissioner aforesaid, stand confirmed, and that his report be put on file.

Afterwards, to wit, on the same day of said term of court, the following order was made and entered of record, which said order is in the words and figures following, to wit:

JOHN P. CABANNE
vs.
SUSAN O'HARA AND OTHERS. } In chancery.

38 This day Henry Starr, in open court, acknowledged that, as a commissioner under a decree of this court in the above cause, he had executed a deed of conveyance to Thomas Prim, bearing date the first day of March, A. D. 1823; also, a deed of conveyance to John L. Rogers of the same date; also a deed of conveyance to the said John P. Cabanne, of the date of the twentieth of February, A. D. 1823; and also a deed of conveyance to John Springer, of the said last-mentioned date; and thereupon the court allow and approved of said deeds, and order the acknowledgements to be certified.

STATE OF ILLINOIS,
County of Pike, ss:

I, Jos. J. Topliff, clerk of the circuit court in and for the said county of Pike, and State of Illinois, do hereby certify that the above and foregoing 7 pages contain a true and complete copy of the convening orders of the respective terms of court for the October term, A. D. 1822, and April term, A. D. 1823, and the orders of said court in the case of
39 John P. Cabanne vs. Susan O'Hara and others, and Daniel C. Boss v. John Adams & Elizabeth Adams, his wife, and Robert Simpson vs. Susan O'Hara & others, as appears of record in vol. "A," on pages 5, 7, 8, 11, 18, 19, 28, 29, and 31, in this office.

Given under my hand, and the seal of said court hereunto affixed, at Pittsfield, in said county of Pike and State of Illinois, this 12th day of September, A. D. 1872.

JOS. J. TOPLIFF, *Clerk.*

[5 cts. U. S. int. rev. stamp canc'l'd.]

The interlineation of 7 & the erasure of 6 in the 4th line from top in the certificate, and the interlineation of "and David C. Boss vs. John Adams & Elizabeth Adams, his wife, and Robert Simpson vs. Susan O'Hara and others," the 7th line from the top of the page in the certificate, and the part of the 8th line, was made October 29th, A. D. 1872, by

JOS. J. TOPLIFF, *Clerk.*

And the plaintiff objected to reading the same because such proceedings did not embrace or relate to the land in controversy; the
40 plaintiff nor those under whom he claimed were not parties or privies to such proceedings, and they were void for want of jurisdiction in the circuit court of Pike County over the persons of the defendants or the subject-matter; but the court overruled the objections and allowed such copies to be read; to which decision the plaintiff excepted.

The defendants then offered to read in evidence a certified copy of the following deed, to wit:

41 *Deed.—Starr to Cabanne.*

This indenture, made this twentieth day of February, one thousand eight hundred and twenty-three, between Henry Starr, appointed a commissioner as hereinafter mentioned, of the county of Madison and State of Illinois, of the first part, and John P. Cabanne, of the county of St. Louis, and State of Missouri, of the second part.

Whereas at the circuit court of Pike County, in said Illinois, at the October term, one thousand eight hundred and twenty-two, of said court, in a certain cause in chancery in said court, in which the said John P. Cabbanne was complainant and Susan O'Harra, the widow, and others, the children and heirs at law of Wm. M. O'Harra, deceased, were defendants, it was amongst other things ordered, adjudged, and decreed that if default should be made in the payment of the sum of five thousand four hundred and sixty-two dollars and twenty-six cents by the said defendants to the complainant on or before the twentieth day of November next ensuing the date of said decree, that
42 the several mortgaged premises in the pleadings in that suit mentioned, being sixty-six quarter-sections of land, should be separately sold at public auction to the highest bidder, at the court-house in the town of Edwardsville, in said county of Madison. And for the purpose of carrying said decree and order of sale into execution, the said Henry Starr was, by the order of said court, appointed a commissioner to make sale of said mortgaged premises, by giving three weeks' notice of the time of such sale in the Edwardsville Spectator, and by placing a like notice on the door of said court-house. And whereas default was made in the payment of the said sum of five thousand four hundred and sixty-two dollars and twenty-six cents, and of every part thereof, the said Henry Starr, in pursuance of the order and decree of the said court did, on the day of the date of these presents, separately sell at public auction, at the door of said court-house in the town of Edwardsville, the said mortgaged premises, having first given three weeks' notice of the time of such sale agreeable to
43 the order of said court. At which time the following-described fifty-two quarter-sections of land, being part of said mortgaged premises, were seperately struck off to the said John P. Cabbanne, he being the highest and best bidder for the same, containing one hundred and sixty acres each, *to* be the same more or less, and are situated in the tract of land appropriated by the act of Congress for military-bounty lands in the State of Illinois: that is to say, the southeast quarter of section thirty-six, in township fifteen north, of range three west, for four dollars. 2. The southeast quarter of section twenty-seven, in township thirteen north, of range one west, for four dollars. 3. The northwest quarter of section twenty-seven, in township fourteen north, of range four east, for two dollars. 4. The northeast quarter of section

thirty-two, in township thirteen north, and range eight east, for four dollars. 5. The northwest quarter of section twenty-seven, in township eleven north, of range seven east, for seven dollars. 6. The
44 northeast quarter of section eleven, in township two north, of range seven west, for nine dollars. 7. The southeast quarter of section thirty-five, in township eight north, of range six west, for seven dollars. 8. The northeast quarter of section five, in township thirteen north, of range four east, for three dollars. 9. The southeast quarter of section twenty, in township twelve north, of range one west, for two dollars. 10. The northeast quarter of section thirty-one, in township twelve north, and range three west, for three dollars. 11. The northwest quarter of section twenty-four, in township fourteen north, and range four west, for six dollars. 12. The northeast quarter of section twenty-four, in township eleven north, of range six east, for six dollars and fifty cents. 13. The northeast quarter of section thirty-six, in township seven north, of range two west, for eleven dollars and fifty cents. 14. The southwest quarter of section twenty-eight, in township ten north, of range four west, for six dollars and fifty cents. 15. The southeast quarter of section two, in township four north, of range six west, for seven-
45 dollars. 16. The southwest quarter of section *in* twenty, in township thirteen north, of range three west, for eight dollars and fifty cents. 17. The southwest quarter of section thirty-six, in township six north, of range seven west, for seven dollars and fifty cents. 18. The southeast quarter of section seven, in township six north, of range six west, for nine dollars and fifty cents. 19. The southeast quarter of section twenty, in township nine north, of range three west, for eleven dollars. 20. The northwest quarter of section twenty-three, in township nine north, of range five west, for eight dollars and fifty cents. 21. The southwest quarter of section twenty-seven, in township three north, of range five west, for twelve dollars and fifty cents. 22. The southwest quarter of section thirty-six, in township eleven north, of range one west, for seven dollars and fifty cents. 23. The southeast quarter of section seven, in township five north, of range seven west, for six dollars. 24. The northeast quarter of section fifteen, in township
46 five north, of range eight west, for ten dollars and fifty cents. 25. The southwest quarter of section twenty-nine, in township six south, of range three west, for six dollars and fifty cents. 26. The northeast quarter of section twenty-seven, in township five north, of range six west, for eight dollars. 27. The northeast quarter of section fourteen, in township eleven north, of range three west, for eight dollars. 28. The northwest quarter of section seventeen, in township two south, of range four west, for thirteen dollars. 29. The northeast quarter of section thirty-six, in township eleven north, of range six east, for ten dollars and fifty cents. 30. The northwest quarter of section thirty-six, in township eleven north, of range six east, for twelve dollars. 31. The northeast quarter of section thirteen, in township three north, of range seven west, for eight dollars. 32. The northwest quarter of section thirteen, in township three north, of range seven west, for twelve dollars. 33. The southeast quarter of section nineteen, in township
47 thirteen north, of range three west, for six dollars. 34. The northeast quarter of section six, in town four north, of range two west, for ten dollars. 35. The southwest quarter of section seven, in township six north, of range six west, for five dollars. 36. The southwest quarter of section twenty-nine, in township seven north, of range three west, for two dollars. 37. The northeast quarter of section twenty-five, in township seven

north, of range two west, for eight dollars and fifty cents. 38. The northeast quarter of section four, in township twelve north, of range three east, for three dollars and fifty cents. 39. The southwest quarter of section twenty, in township eight north, of range two west, for five dollars. 40. The southwest quarter of section fifteen, in township six north, of range three east, for fourteen dollars. 41. The southeast quarter of section twenty-five, in township three north, of range two east, for fifteen dollars. 42. The southwest quarter of section twelve, in
48 township five north, of range seven west, for four dollars. 43. The southeast quarter of section twenty-six, in township three north, of range seven west, for eight dollars. 44. The northeast quarter of section four, in township three north, of range six west, for two dollars. 45. The northwest quarter of section nine, in township six north, of range five east, for ten dollars. 46. The southeast quarter of section eleven, in township ten north, of range six east, for eight dollars. 47. The southeast quarter of section fifteen, in township six north, of range eight west, for six dollars. 48. The northwest quarter of section thirty-three, in township twelve north, of range one west, for two dollars. 49. The northwest quarter of section five, in township two north, of range eight west, for thirteen dollars. 50. The northwest quarter of section three, in township three north, of range six west, for five dollars and fifty cents. 51. The southwest quarter of section fifteen, in township three north, of range eight west, for ten dollars. 52. Also the
49 southeast quarter of section fourteen, in township eleven north, of range four west, for six dollars and fifty cents, amounting in the whole to three hundred and ninety dollars. Now, this indenture witnesses that the said Henry Starr, acting as commissioner as aforesaid, in order to carry into effect the so made as aforesaid, and in pursuance of the decree of said court, and in consideration of the premises and of the said sum of three hundred and ninety dollars paid by the said John P. Cabbanne to the said Henry Starr, the receipt whereof *f* he does hereby acknowledge, hath granted, bargained, sold, conveyed, and confirmed, and by these presents does grant, bargain, sell, convey, and confirm unto the said John P. Cabbanne and his heirs forever, the before-mentioned fifty-two quarter-sections of land, with all their appurt*i*nances, to have and to hold the same unto him, the said John P. Cabbanne, and his heirs forever.

In testimony whereof I, the said Henry Starr, acting as commis-
50 sioner aforesaid, have hereunto set my hand and seal the day and year first before written.

[SEAL.] HENRY STARR,
Commissioner.

STATE OF ILLINOIS, *Pike County:*

Circuit court, Ap'l term, 1823.

Be it remembered that at this present term Henry Starr acknowledged in open court that, as commissioner, he had executed the within deed for the purposes therein expressed, and thereupon the court allowed and approved of said deed, and ordered the acknowledgment to be certified by the clerk, which is accordingly hereby done.

Witness, James Whitney, clerk of said court, this first day of May, A. D. 1823.

J. WHITNEY, *Clerk.*

STATE OF ILLINOIS,
Warren County, ss :

I, James L. Dryden, clerk of the circuit court & ex-officio recorder
51 of deeds, do certify that the foregoing commissioner's deed from Henry Starr, com'r, to John P. Cabanne, is a true copy of such deed as filed Septr. 23, 1836, and appears of record on pages 506, 7, 8, & 9 in vol. 2 of Warren County records, now in my custody.

In witness whereof I hereto set my hand and seal this 7th November, A. D. 1872.

J. L. DRYDEN,
Clk. Cir. Court.

52 And the plaintiff objected because it was not proved or acknowledged according to law, but the court overruled the objection, and allowed it to be read; to which decision the plaintiff excepted.

The defendants then read in evidence a deposition of Lucien D. Cabanne, as follows, to wit:

Deposition of Lucien D. Cabanne, taken October 31st, 1872.

To interrogatory 1st, of the interrogatories hereto annexed, to wit: What is your name, age, and place of residence? he answered:

Answer. Lucien D. Cabanne; I am 58 years of age, and reside at No. 1121 Chestnut street, in the city of St. Louis, Missouri.

Int. 2. Are you or are you not the Lucien D. Cabanne who on the 18th day of April, 1856, conveyed by quit-claim deed to the defendants Joseph H. Dana and Alfred Thompson the northwest quarter of section eleven, in township 14 north, range eight east, situated in Bureau County, Illinois?

Ans. to int. 2. I remember having made such a deed to certain
53 parties, I think named Dana and Thompson, for land in the military tract, I think in Bureau County, this State, Illinois. I do not remember the numbers or quantity of the land. The deed was made about the year 1856.

Int. 3. Were you or were you not ever acquainted with one John P. Cabanne, who is named as grantee, or mortgagee, in a certain instrument of writing, dated April 13th, 1821, on record in Pike County, Illinois, and purporting to be a mortgage from one William M. O'Hara and wife to said John P. Cabanne, and purporting also to convey therein the said tract of land described in question two, together with other lands? If you say you are acquainted with him, then state what facts or circumstances you may know by way of identifying the said John P. Cabanne as the said mortgagee.

Ans. to 3d int. I was acquainted with John P. Cabanne. He was my father. I have *have* heard, most of my life, of such a mortgage, and of said O'Hara's indebtedness to my father, to secure which the mort-
54 gage was given. I have no doubt my father was the same John P. Cabanne who was the mortgagee referred to in the question. This conviction of his identity is based upon my knowledge of his connection with the lands included in the mortgage, upon my information concerning said William M. O'Hara's indebtedness to him, the general reputation in his family of the matter, and the personal connection which I and his other heirs had with the lands since his death.

Int. 4. State, if you know, whether or not the said John P. Cabanne is now living. If not, then state, if you know, when and where he died.

Ans. to int. 3. He died at St. Louis, Mo., in July, 1842.

Int. 5. State, if you know, whether or not said John P. Cabanne was ever married. If yes, then state whether or not he had any children as the result of his marriage, if you know; and if you say he had, then give, if you know, the names of all of his said children.

Ans. He had some children. John Charles, the oldest; myself, Lucien D.; the next in age, Francis, Jules Louis, Julia Kingsbury, Adele Sarpy, and Louise Edwards. These were all his children, and were all the result of his marriage.

Int. 6. State, if you know, whether or not said John P. Cabanne at the time of his death left him surviving any children or descendants of dec'ased children. If yes, give the names of all said children,
55 and the descendants of deceased children, if any, who survived the said John P. Cabanne, if you know.

Ans. I named all the children in my last answer. All are deceased except myself and Francis. All his children survived our father except Julia, who was wife of James W. Kingsbury, and died in 1833. Her said husband died in 1853. Their only children and heirs who survived them were Virginia De Girverville, of France, Adele Waterman, and Jules C. All living except the last, Jules C., who died without issue. Charles, the oldest son of John P. Cabanne, left three sons surviving him; all living except one, who died without issue, viz: John, deceased; Joseph C., and Sarpy Carr, both living. Jules Louis, the third son of my father, left surviving him three children, all living, namely, Stella, John Charles, and Rae McNair. My sister, Adele Sarpy, left surviving her one child only, Virginia F. Berthold, still living. These are the names of all the descendants of the deceased children of my father, John P. Cabanne, and who survived him.

56 Int. 7. State, if you know, whether or not the persons named in your last answer as the children of said John P. Cabanne were the only children born in wedlock he ever had. If you say there were any other or others who died before him, then state, if you know, who such other child or children were, giving their names, and when they died, and whether or not they left them surviving any children, husbands, or wives; and, if any, give their names.

Ans. There were none other than those already mentioned by me in this deposition. The only child of my father who died before him was Julia Kingsbury. I have named her only children and heirs, living and dead.

Int. 8. Are you or are you not acquainted with the persons named as grantors in a certain deed appearing of record in Bureau County, Illinois, purporting to be dated January 28th, 1854, and to convey the aforesaid tract of land to one John B. Sarpy, to wit, John Charles Cabanne, Francis Cabanne, Fred. Berthold, Virginia S. Berthold, M. Vir-
57 ginia Kingsbury, Adele L. Kingsbury, Jule C. Kingsbury, Julius L. Cabanne, and Lucien D. Cabanne? If yes, then state, if you know, what relationship, if any, said grantors bore to said John P. Cabanne.

Ans. They were all children or grandchildren, heirs of my father, as I stated before, except Fred. Berthold, who was husband of a grandchild. I am, or was, well acquainted with them all.

Int. 9. State if you know whether or not at the date of the deed referred to in the last question there were then living any children or descendants of deceased children of said John P. Cabanne other than those named as grantors in said deed. If any, state who they were.

Ans. There were some others then living than said grantors in said deed. There were not any husbands, wives, children, or children's chil-

dren of said John P., my father, then in existence who did not join in said deed.

Int. 10. State any other item of knowledge you may have which will tend to show that the persons named in said deed to Sarpy as
58 grantors were the only heirs of said John P. Cabanne and joined in said conveyance.

Ans. The interest of Julius L. Cabanne was conveyed by me as his attorney in fact under a power of attorney from him to me then held by me, which I am not able to produce, it having been mislaid, lost, or destroyed, as I am satisfied, after having made diligent search for it where it ought to be. It contained a power to me from my said brother to convey his interest in the land involved in said deed; he executed it, and I know it was genuine. I think it was recorded in St. Louis County, Missouri.

Int. 11. Have you ever had any knowledge of or acquaintance with said William M. O'Hara and his reputed daughter, Helen O'Hara Harrell, claiming to be the widow of Abram D. Harrell? If yea, state, if you know, whether they or either of them ever resided in the State of Illinois; and, if yes, when, how long, & where?

Ans. I never knew or had any acquaintance with any of them.

59 Int. State, if you know, whether or not the debt described in and secured by the mortgage referred to in interrogatory three, or any part thereof, was ever paid by said Wm. M. O'Hara to said John P. Cabanne, his heirs, assigns, or legal representatives? State any facts or circumstances within your knowledge which will throw any light upon the question of the payment or non-payment of said mortgage-indebtedness as fully as if you were particularly interrogated.

Ans. to int. 12. Of my own knowledge I know nothing about the mortgage, or whether it was paid by O'Hara or anybody else or not. It was always understood in our family that it was never paid. I was told by John B. Sarpy, my brother-in-law, trustee for the heirs, administrator of my father's estate, and guardian for my minor co-heirs, that the said debt was never paid, and that the mortgage was foreclosed and the land conveyed by it was taken for the debt.

L. D. CABANNE.

Which was received in evidence subject to all legal objections as to competency or any part thereof.

The defendants then read in evidence a certified copy of a deed dated April first, A. D. 1861, executed by Frederick Berthold & Virginia S., his wife, Jules L. Cabanne & Ann S. M. Cabanne, his wife, Alfred
60 M. Waterman & Adelia L., his wife, M. Virginia Kingsbury, Francis Cabanne of St. Louis, Missouri, & Lucius D. Cabanne & Susan, his wife, & Jules C. Kingsbury, of Belleville, Illinois, & John P. Cabanne, of St. Louis, Missouri, to Booth Nettleton, conveying the quarter-section described in the declaration in fee, by quit-claim deed, with all other lands in the State of Illinois owned by the grantors or in which they had any interest, for the consideration of $400.

The defendant then read in evidence a deed dated May first, A. D. 1861, executed by Booth Nettleton, conveying the east half of said quarter-section to the defendant Dilto; a contract by Nettleton to the defendant Dunn, dated November sixth, 1861, agreeing to sell and convey the west half thereof, and a deed dated May twenty-sixth, 1865, executed by said Nettleton, conveying the same to Dunn.

The defendants then read in evidence the following two stipulations, to wit:

61 Circuit court United States, northern district of Illinois.

KIBBE
v.
PEACOCK ET. AL.

SAME
v.
MCCORMACH ET AL.

SAME
v.
DUNN & DILTO.

It is stipulated in each of the above cases to admit, should the evidence become material upon the trial, that the defendants & their grantors have been in possession of the premises in question, under color of title, for fifteen years last past, & paid all the taxes assessed thereon in the mean time, so as to bring them within the limitation of 1839, & that said possession has been by actual residence on the
62 lands, & if title deducible of record is produced on the trial to *to* accompany said possession so as to make limitation under act 1835, said premises prior to that date being vacant and unoccupied, i. e., prior to Dec. A. D. 1857.

R. K. TURNER, *P. G.*

63 United States circuit court for northern district of Illinois.

GEORGE A. KIBBE
v.
SAMUEL DILTO.

SAMUEL MCCORMICK
v.
ANDREW PEACOCK.

It is hereby stipulated that the depositions of Helen O'Hara Howell, taken by plff., & the cross-examination or deposition of Miss Howell, taken by dfts., & the deposition of Lucien D. Cabbanne, taken by the defts. in the case of Geo. A. Kibbe v. Thompson et al., may be used in all the above cases as evidence; & it is agreed that the depositions of Wm. Ross & Jos. J. Topliff, for which a dedimus has been sued out in said court in case vs. Thompson et al., may, when taken, be used in evidence in all the above cases, provided it is taken before Dec. 10th, 1872, & provided said Turner does not notify said attys. for deft. that he
64 will not so consent, in time for them to take same cases above, may be continued at next term of this court, & also agreed that if in case vs. Thompson, if Turner shall desire to retake deposition of Wm. Ross, all above cases may be continued for said Turner to retake said Ross' deposition on cross-examination of said Ross.

R. K. TURNER *P G.*

Nov. 13, 1872.

MILLER, FROST, & LEWIS,
Attys. for Deft.

65 The defendants then read in evidence as color of title a deed dated June twelfth, 1857, executed by George F. Harding and

Joseph Mathews, purporting to convey the quarter-section in controversy to the defendants.

The defendants the' read in evidence a deposition of Helen O'Hara Harrel, in which she testified to the same facts contained in the deposition read by the plaintiff. And also that neither her father, mother, brothers, or sisters, or any of them, ever lived or resided in Illinois, and that Susan O'Hara, the mother, died in the spring of 1822, or early in winter of 1823.

The defendants then proved by a deposition of Wm. Ross that he was clerk of Pike circuit court in 1825, when the house in which the files & records were kept was destroyed by fire, but that he thought that all the files & records were saved and turned over to his successor; and also by Joseph Topliff that he was clerk in 1872; that he had made search in the office and could only find the record of which the foregoing were copies.

66 This was all the evidence on the part of the defendants.

The plaintiff then read in evidence the following exemplification of a record, to wit:

67 At a circuit court begun and held at Coles Grove, within and for the county of Pike, on Monday, the first day of October, in the year one thousand eight hundred and twenty-one:

Present, the honorable John Reynolds, judge.

The sheriff of the county returned a panel of grand jurors, which being called over, sixteen of them appeared and were sworn agreeably to law, viz: Levi Roberts, foreman; Ebenezer Franklin, Gardner H. Tullus, Joel Bacon, George Kelley, Ebenezer Smith, David Dutton, Amos Bancroft, James Nixon, Nathaniel Shaw, Thomas Proctor, Richard Dilley, Stephen Dewey, William Massey, Canfort Shaw, and Daniel Phillips, and the following persons were called but made default, to wit: Leonard Ross, Henry J. Ross, Daniel Shin, James M. Seeley, Abraham Kuntz, Levi Newman, Henry Loup, John Bolter, and John Jackson.

Joseph Jervais and John Shaw, interpreter, sworn to give evidence to the grand jury.

SAMUEL SMITH, ASSIGNEE OF ELIAS K. KANE, plaintiff, *vs.* WILLIAM FRYE, DEFENDANT. } Action of debt.

68 The sheriff having in this cause returned the defendant not found, ordered that an alias summons issue, returnable to the next term of this court. James Nixon and Ebenezer Smith sworn to give evidence to the grand jury.

SALLY DURHAM, PLAINTIFF, *vs.* JOHN DURHAM, DEFENDANT. } Libel for divorce.

The defendant having made default in this cause, it is ordered that the matters of fact be enquired of by a jury, whereupon the following persons were impanneled and sworn, to wit: William Ward, Barnabas Haynes, Mason Cockerill, William Keyes, William Mettz, David Eveland, Rial Crandall, Charles M. Griffin, Jacob Mettz, Thomas Church, Wales Learned, and Abner Blaisdell, who were sworn to well and truly try the matters submitted to them, and a true verdict to give according to evidence.

The jury aforesaid, upon their oaths aforesaid, returned into court the following verdict, to wit:

"We, the jury, find, according to the testimony given in this
69 case, that the said Sally Durham was lawfully married to the said John Durham, and that the said John Durham has been absent from her, the said Sally, out of this State more than two years before the day of filing the libel in this case, without any just cause."

It is thereupon ordered and decreed by the court that the banns of matrimony between the said Salley Dunham and John Dunham be dissolved, and that the said Salley have the care and custody of her child, the said John and Salley having had but one child during the time of their marriage.

Ordered that court adjourn until to-morrow morning *to* nine o'clock.

TUESDAY MORNING, *October 2nd*, 1821.

Court opened pursuant to adjournment; present, the hon'ble John Reynolds, judge.

Bigelow C. Fenton, elected and commissioned sheriff of the county of Pike, appeared in court and produced a bond in the usual form, with Levi Roberts and John Shaw, his securities, who were approved of by the court.

James W. Whitney, appointed clerk of this court, produced
70 the following appointment and certificate of his having taken the oaths prescribed by law, which were ordered to be entered on the records of this court as follows, to wit:

STATE OF ILLINOIS:

"I do hereby constitute and appoint James W. Whitney, esq'r, clerk of the circuit court of Pike County.

"Done in said State, this 12th day of March, 1821.

"JOHN REYNOLDS. [SEAL.]

"STATE OF ILLINOIS,
"*Madison County, ss:*

"This day personally appeared before me, Benjamin Spencer, a justice o the peace in and for said county, James W. Whitney, who thereupon took the several oaths prescribed by law as clerk of the circuit court of Pike County, this 13th day of March A. D. 1821.

"BENJAMIN SPENCER, *J. P.*"

And also produced a bond in the usual form, executed by himself, with Levi Roberts and David Dutton, his securities, who were approved by the court.

WILLIAM FRYE, PLAINTIFF ON APPEAL,
vs.
DAVID DUTTON, DEFENDANT.

71 Ordered, that this cause be dismissed, the court not having jurisdiction thereof by reason that more than twenty days had elapsed after the rendition of the judgment in the court below before bringing the appeal in this court.

It is therefore considered by the court that the said defendant recover against the said plaintiff his costs by him about his defence in this behalf expended.

The grand jury came into court and brought in the following bill of indictment, to wit:

THE PEOPLE, &c.,
vs.
PENNESAW AND SHONWENNEKEK, TWO INDIANS. } Indictment for murder, a true bill.

It is ordered by the court that Daniel P. Cook and Palemon H. Winchester be assigned as counsel for the prisoners. The prisoners being brought into court and arraigned, pleaded "Not guilty." And thereupon came a jury of twelve good and lawful men, to wit, Jacob Fenner, Williard Keyes, Thomas Church, Garret Vandusen, Mason Cockerill, Simon Croyier, Charles M. Griffin, Jacob Mettz, William Mettz, David Eveland, Jonathan Simons, and Barnabas Haynes,
72 who, being sworn well and truly to try the issue joined and true deliverance make between the people aforesaid and the prisoners aforesaid, ordered that court adjourn untill to-morrow morning at seven o'clock.

WEDNESDAY MORNING, *October 3d*, 1821.

Court opened, pursuant to adjournment.

Present, the hon'ble John Reynolds, judge. Ordered that John G. Curtis and Bilus Jones be allowed for their attendance three days each at this term.

THE PEOPLE, &C.,
vs.
PENNESAW & SHONWENNEKEK, TWO INDIANS.

The jury in this came into court and returned the following verdict, to wit:

"We have agreed in our verdict, according to the evidence before us, that Pennesaw, otherwise called Traveller, is guilty of manslaughter, and that the other, called Spice Brush, is not guilty."

It is therefore ordered and adjudged by the court that the said Shonwennekek, otherwise called Spice Bush, go hence and be wholly
73 discharged and acquitted. And it is therefore further ordered and adjudged by the court that the said Pennesaw, otherwise called Traveller, make his fine to the people of this State in the sum of twenty-five cents, and be imprisoned for the term of twenty-four hours.

John Shaw and Jean Baptiste Patelle, sworn interpreters upon the trial aforesaid.

And thereupon court adjourned until court in course.

At a circuit court begun and holden at Cole's Grove, within and fo the county of Pike, on Monday, the twenty-third day of April, one thousand eight hundred and twenty-two.

Present the hon'ble Joseph Phillips, chief-justice. The sheriff of the county returned a panel of grand jurors, which being called over, sixteen of them appeared and were sworn agreeably to law, viz, John Shaw, foreman, Garrett Van Dusen, John Wood, Rufus Brown, Jeremiah Rose, David Eveland, Nathaniel Shaw, Jonathan Simonds, Thomas Church, William Mettz, Jacob Mettz, Daniel Shin, Barnabas Haynes, Thomas R. Brashear, Nathaniel Hinckley, and Jacob Fenner.

74 John G. Curtiss sworn to take charge of the grand jury.

Garrett Van Dusen, Jean B. Belfy, Daniel Shin, Jonathan Simonds, and Jean B. Tebo, severally sworn to give evidence to the grand jury.

SAMUEL SMITH, ASSIGNEE OF ELIAS K. KANE, plaintiff, *vs.* WILLIAM FRYE, DEFENDANT. } In debt.

This day came the plaintiff by Henry Starr, his attorney, and the defendant in proper person says nothing in bar or preclusion of the plaintiff's action, but confesses judgment for the sum of one hundred dollars of the debt in the declaration mentioned. Thereupon it is considered by the court that the said plaintiff recover the sum of one hundred dollars as aforesaid confessed, besides his costs by him about his suit on this behalf expended; and the said defendant mercy, &c.

DANIEL CHURCH, SEN'R., PLAINTIFF, *vs.* BARNABAS HAYNES, DEFENDANT. } In case.

By consent of both the parties in this cause the same is dis-
75 missed at the costs of the defendant. Therefore it is considered by the court that the said plaintiff recover his costs by him about his suit in this behalf expended; and the said defendant in mercy, &c.

IROM GILHAM, ADMR. OF WILLIAM VAUGH, dec'd, plaintiff, *vs.* JEAN B. TEBO, DEFENDANT. } In debt.

The plaintiff in this cause being solemnly called, comes not, but makes default.

It is therefore considered by the court that the said plaintiff take nothing by his said suit, and that the said defendant go hence without day and recover against the said plaintiff his costs by him about his defence in this behalf expended. And that the said plaintiff be in mercy, &c.

NATHANIEL SAWYER, PLAINTIFF, *vs.* NATHANIEL COGSWELL AND WILLIAM COGSWELL, defendants. } In debt.

The plaintiff in this case, by Henry Starr, his attorney, moves to dismiss the same.

It is therefore ordered and adjudged that the same be dis-
76 missed at the costs of the plaintiff.

CHARLES W. HUNTER, PLAINTIFF, *vs.* ABNER EADS, DEFENDANT. } In case.

This day came the plaintiff, by his attorney, and the defendant in proper person came into court and confessed judgment for the sum of thirty-eight dollars and eighty-eight cents damages. Therefore, it is considered by the court that the said plaintiff recover against the said defendant his damages aforesaid by this defendant in form aforesaid

confessed, and also his costs by him about his suit in this behalf expended, and the said defendant in mercy, &c.

DANIEL C. BOSS, COMPLAINANT,
vs.
JOHN ADAMS AND ELIZABETH, HIS WIFE, defendants. } In chancery.

It appearing to the court that the defendants in this cause are not inhabitants of this State, and they not having answered the complainant's bill, it is ordered by the court that they file their answers to
77 said bill with the clerk of this court on or before the first day of the next October term of said . or that said bill will be taken for confessed against them. And it is further ordered that a copy of this order be published three weeks successively in the Edwardsville Spectator.

ROBERT SIMPSON, COMPLAINANT,
vs.
SUSAN O'HARA AND OTHERS, DEFENDANTS. } In chancery.

JOHN P. CABANNA, COMPLAINANT,
vs.
SAME DEFENDANTS. } In chancery.

Ordered that the same notice be given in the two last cases as in the one immediately foregoing.

JESSE SCHOLFIELD AND OTHERS, PLAINTIFFS,
vs.
DAVID J. GREEN, DEFENDANT. } On foreign attachment.

On motion of the plaintiffs, by their attorney, ordered that the plaintiffs give notice in the Edwardsville Spectator agreeably to the
78 statute in such cases made and provided.

DAVID EVANS, APPELLEE,
vs.
THOMAS R. BRASHEAR, APPELLANT. } On appeal.

The appellee in this cause, although solemnly called, comes not, but makes default. It is therefore ordered by the court, on motion of the attorney of the appellant, that the judgment below be reversed, and that the said appellant recover against the appellee his costs by him about his suit in this behalf expended.

On motion of Paleman W. Winchester, attorney for the appellee in the cause aforesaid, ordered that the said cause be reinstated and placed in the same situation as it was before judgment rendered.

The court having considered the cause aforesaid, and the suggestions of both parties, are of the opinion that the judgment below be affirmed.

Therefore, it is adjudged by the court that the judgment below be affirmed, and that the appellee recover his costs by him about this suit expended; and the appellant in mercy, &c.

79 JEREMIAH GRANT, APPELLEE,
vs.
JOHN L. BOGARDUS, APPELLANT. } On appeal.

The appellee in this cause having appeared, by his attorney, and the appellant, although solemnly called, comes not, but makes default. It

is therefore considered by the court that a procedendo be issued to the court below, and that the appeal be dismissed and the appellee recover his costs by him about this cause expended; and the said appellant in mercy, &c.

WILLIAM FRYE, QUI TAM, PLAINTIFF,
vs.
LEVI ROBERTS, DEFENDANT. } On appeal.

This day appeared in open court the parties aforesaid, and by mutual consent agreed that the judgment in the court below be affirmed and each party to pay half the costs. Therefore, it is considered by the court that the judgment of the court below be affirmed, and that the plaintiff pay one-half of the costs and the defendant the other half.

RICHARD SILVERS, PLAINTIFF,
vs.
THOMAS PROCTOR, ADMINISTRATOR, DEFENDANT. } In debt.

80 This day come the plaintiff, by his attorney, and the defendant, by his attorney, appeared in open court, and the said defendant confesses judgment for assetts in future for the sum of one hundred and sixty-two dollars and fifty cents, the debt in the declaration mentioned, and also for the sum of twenty-five dollars and eighteen and a half cents, the said plaintiff's damages besides his costs, by him about his suit expended; therefore it is considered that the said plaintiff do recover his debt and damages aforesaid, agreeably to the confession aforesaid, in form aforesaid confessed, of the goods and chattels lands and tenements, or assetts in the hands of the said administrator to be administered, but with this express understanding that this judgment is not in anywise to interfere with the administrator's right to retain all such demand out of said estate as may be due him agreeably to law, and that the said plaintiff recover his costs by about his suit on this behalf expended.

WILLIAM FRYE, PLAINTIFF,
vs.
DAVID DUTTON, DEFENDANT. } On certiorari.

81 The defendant, by Samuel D. Lockwood, his attorney, moves to dismiss this cause, and the same is continued to next term.

Henry J. Ross is excused, on account of indisposition, from attending as a grand juror at this present term.

The grand jury came into court and presented the following bill of indictment, to wit:

THE PEOPLE, &C.,
vs.
LEVI GILBERT. } Indictment for larceny. A true bill.

The prisoner being arraigned upon the indictment aforesaid, and after the same was read to him he pleaded "not guilty."

Ordered that the trial of the prisoner aforesaid be postponed until nine o'clock to-morrow morning.

The grand jury having no further business before them were discharged by the court.

Ordered that court adjourn till nine o'clock to-morrow.

TUESDAY MORNING, *April twenty-fourth*, 1822.

Court opened pursuant to adjournment. Present, the same as before.

82 THE PEOPLE, PLAINTIFF, *vs.* JOHN L. BOGARDUS, DEFENDANT. } Assault and battery. On appeal.

The appellant having failed to appear in this cause, it is ordered and adjudged by the court that the said appeal be dismissed, and a procedendo issue to the court below, commanding them to proceed in the cause as tho' no appeal had been taken; and that the appellant pay the plaintiffs their costs by them about this suit expended, &c.

SAME *vs.* LEVI GILBERT. } An indictment for larceny.

The prisoner in this cause moves a continuence until next term for the want of material witnesses, which is granted him on condition of being recognized to appear at the next term in the sum of one hundred dollars, with security; but, the prisoner not at present being able to comply therewith, he is committed to the custody of the sheriff, who is directed to take security in the sum of one hundred dollars, and on the prisoner's complying therewith he is to be discharged out of custody.

83 Garret Van Dusen, Jean B. B. Mefry, Daniel Shin, and Jonathan Simonds came into court and severally acknowledged themselves indebted to the people of the State of Illinois in the sum of fifty dollars each, to be levied of their goods and chattels, lands and tenements, if default be made in the condition following, to wit, that they be and appear at the next term of this court to give evidence on an indictment pending against Levi Gilbert for larceny, and not depart thence without leave of the court, then the above recognizance to be void; otherwise to be and remain in full force and virtue.

On reading and filing the affidavit of Levi Roberts, one of the administrators of the estate of James D. Wadsworth, deceased, setting forth that notice has been duly served upon the infant heirs of said deceased, and, on motion of said administrator, it is hereby ordered and decreed that the said administrator be, and are hereby, licensed and permitted to sell and dispose of so much of the real estate of said deceased as will be sufficient to pay his debts on their entering into bond with two

84 securities in the sum of one thousand dollars each, agreeably to the statute in such cases provided.

Whereupon the said Levi Roberts tendered into open court James Nixon and John Shaw his securities, who were approved of by the court.

On reading and filing the affidavit of James W. Whitney, administrator of the estate of Eliphalet Dunsmore, deceased, a similar permission is also given him to dispose of real estate belonging to said Dunsmore, deceased, who tendered Leonard Ross as his security, who was approved by the court.

JOSIAS RANDLE, PLAINTIFF, *vs.* FRANCIS GAUTZ, DEFENDANT. } On foreign attachment.

On motion of plaintiff's attorney, this cause is continued to next term.

It is hereby certified that John G. Curtiss attended the grand jury one day at this term as constable.

Ordered that court adjourn till court in course.

At a circuit court, begun and holden at Cole's Grove, within
85 and for the county of Pike, on Monday, the seventh day of October, one thousand eight hundred and twenty-two. Present, the hon'ble John Reynolds, judge.

Leonard Ross, elected and commissioned sheriff of Pike County, appeared in court with a bond executed by himself and John Ross and William Ross, his securities, who are approved of by the court.

David Blackwell, esqr., deputed by the attorney-general, is admitted by this court to prosecute.

On motion of Mr. Blackwell, the three following rules were ordered to be entered of record, to wit :

THE PEOPLE, &C.,
vs.
LEONARD ROSS.

On motion of Samuel D. Lockwood, attorney-general of the State of Illinois, founded on the affidavit of John Shaw, who avows himself relator, and Bigelow C. Fenton, it is ruled and ordered that Leonard Ross be and appear here in court on Tuesday morning of the present term, and show cause, if any he can, why an information in nature of
86 quo warranto shall not be filed and exhibited against him for usurping the office of sheriff of Pike County, even since the twenty-first day of September of the present year.

THE PEOPLE, &C.,
vs.
DANIEL WHIPPLE.

On motion of Samuel D. Lockwood, esquire, attorney-general of the State of Illinois, founded on the affidavits of John Shaw and Jacob Bacon, it is ordered and ruled that Daniel Whipple be and appear here in court on Tuesday morning of the present term, and show cause, if any he can, why an information in nature of quo warranto shall not be filed and exhibited against them for usurping the office of coroner of said county ever since the twenty-eighth day of September of the present year.

THE PEOPLE
vs.
DAVID DUTTON.

On motion of Samuel D. Lockwood, esqr., attorney-general of the State of Illinois, founded on the affidavits of John Shaw and
87 Ebenezer Smith, it is ordered and ruled that David Dutton, Ossian M. Ross, and James M. Seeley be and appear here in court on Tuesday morning of the present term, and show cause, if any then can, why an information in nature of quo warranto shall not be filed and exhibited against them for usurping the offices of county commissioners of Pike County ever since the second day of September of the present year.

THE PEOPLE, &C.,
vs.
JOHN L. BOGARDUS.

On motion of Mr. Blackwell, ordered that the bill of costs in this case be referred to retaxation.

JEREMIAH GRANT
vs.
SAME.

On a like motion the like order in this cause.

DANIEL D. SMITH
vs.
MASON COCKERELL.

On motion of defendant, by his attorney, to discharge the recog-
88 nizance of bail, the court is of opinion, after taking the same into consideration, that the said motion be overruled.

WILLIAM FRYE
vs.
DAVID DUTTON. } On certiorari in nature of an appeal.

The court having heard the proofs and allegations of both parties, and having taken the same into consideration, is of opinion that the defendant is indebted to the plaintiff in the sum of one dollar and thirty-five cents. Whereupon the defendant, by his counsel, moves for leave to file reasons for a new hearing, which motion is granted.

Henry Smith, who was recognized to appear at this court, on being called by the sheriff, answered, and Justus T. Perrigo, the complainant, being also called, did not appear. Therefore ordered that the said Henry Smith be discharged from his recognizance.

JONAS RANDLE
vs.
FRANCIS GAUTZ. } On foreign attachment.

This day came the plaintiff by Henry Starr, his attorney, and
89 the defendant, being solemnly called, came not, but made default, and it appearing to the court that the publication has been made in the Edwardsville Spectator, as required by law, it is therefore considered by the court that the plaintiff ought to recover ; but because it is unknown to the court what damages the plaintiff has sustained by reason of the non-performances of the promises and undertakings in the plaintiff's declaration mentioned, therefore let a jury come forthwith, to enquire of those damages.

And thereupon comes a jury, to wit : Gilbert Travis, Henry J. Ross, James Rice, Alfred Bissell, Thos. R. Brashear, Daniel Churchan, Barnaby McGeary, Abner Blaisdell, Amos Bancroft, John Shaw, Rial Crandall, and Wales Learned, who, being elected, tried, and sworn upon their oaths, do say that the plaintiff has sustained damages by reason of the non-performance of the several promises and undertakings in the plaintiff's declaration mentioned, to four hundred and sixty-six and sixty-one cents damages. Therefore it is considered by the court
90 that the plaintiff recover the aforesaid sum of four hundred and sixty-six dollars and sixty-one cents, his damages aforesaid, in form aforesaid expressed, and also his costs by him about his suit in this behalf expended, to be taxed; and the said defendant in mercy, &c.

JESSE SCHOLFIELD & OTHERS
vs.
DAVID J. GREEN. } On foreign attachment.

It appearing to the satisfaction of the court that publication has been made according to law in the Edwardsville Spectator, but as to any fur-

ther proceedings in this cause the court took time until to-morrow morning to consider thereof.

Levi Gilbert, indicted for larceny, is produced in open court by Simon Crosier, his bail, and surrendered to the sheriff of Pike County, in discharge of his recognizance.

DANIEL D. SMITH *vs.* MASON COCKERELL. } Action of trespass, assault & battery.

By consent of both parties this cause continued until next term.

JAMES LEVINE *vs.* NATHANIEL HINCKLEY. } On appeal.

91 The court having heard the proofs and allegations of both the parties in this cause, and having considered the same, is of opinion that the defendant is indebted to the said plaintiff in the sum of seven dollars and twelve and a half cents.

It is therefore considered and adjudged by the court that the plaintiff recover the aforesaid sum of seven dollars and twelve and half cents, besides his costs by him in and about his said suit expended, to be taxed; and the said defendant in mercy, &c.

THOMAS R. BRASHEAR *vs.* WALES LEARNED. } On appeal.

The court having heard the proofs adduced in this cause, is of opinion that the same is not sustainable by the plaintiff; but as to what judgment the court will render thereupon, that subject is taken under advisement until to-morrow.

JAMES LEVINE *vs.* DANIEL D. SMITH. } On appeal.

Ordered that this cause be continued until to-morrow.

92 DANIEL C. BOSS *vs.* JOHN ADAMS & ELIZABETH, HIS WIFE. } Bill in chancery to foreclose a mortgage.

Ordered that the order requiring publication to be made entered of record in this cause at the last term of this court, be revised and continued in force until the next term, in all respects as the same was when first made.

JOHN P. CABANNE, COMPLAINANT, *vs.* SUSAN O'HARA AND OTHERS, DEFENDANTS. } Bill in chancery.

This day came the complainant by his counsel, and it appearing to the court that the order made at the last term for the appearance of the defendants in this cause has been published three weeks successively in the Edwardsville Spectator, as required by said order, and the defendant

not having entered their appearance herein, or answered the bill of complaint, on motion of the complainant's counsel, it is ordered by the
93 court that said bill be, and the same is hereby, taken for confessed against them. And it appearing to the satisfaction of the court that there is due to the complainant the sum of five thousand and four hundred and sixty-two dollars and twenty cents by virtue of the three promissory notes and indentures of mortgage mentioned and set forth in the bill of complaint, being the principal and interest due on those notes—

It is, therefore, ordered, adjudged, and decreed by the court that the defendants pay to the complainant the said sum of five thousand four hundred and sixty-two dollars and twenty cents on or before the twentieth day of November next, together with the costs of this suit, to be taxed by the clerk; and, on such payment being made, that the complainant deliver up to the defendants to be cancelled the two deeds of mortgage set forth in the bill; but on failure, neglect, or omission of the defendants to pay said sum of five thousand four hundred and sixty-two dollars and twenty cents to the complainant on or before the said twentieth day of November next, then and in that case it is further ordered, adjudged, and decreed by the court that the said defend-
94 ants and each of them be forever barred foreclosed from all equity of redemption of, in, and to the mortgaged premises mentioned in the bill of complaint and every part and parcel thereof.

And it is further ordered, adjudged, and decreed by the court that all and singular the several and respective mortgaged premises mentioned and described in the complainant's bill of complaint, with the appurtenances, being sixty-six quarter-sections of land, be separately sold at public auction to the highest bidder.

And, for the purpose of carrying this decree into execution, it is further ordered and decreed by the court that Henry Starr be, and he is hereby, appointed a commissioner to make sale of said mortgaged premises, as soon as may be convenient after the twentieth day of November next, at the court-house in the town of Edwardsville, in the county of Madison, giving three weeks' previous notice of the time of such sale in the Edwardsville Spectator, published in said town, and also by placing a like notice on the door of said court-house; and that he execute a deed or deeds to the purchaser or purchasers thereof;
95 and that with the monies arising from such sales he pay to the complainant the said sum of five thousand four hundred and sixty-two dollars and twenty cents, with interest thereon at the rate of six per cent. per annum from the date of this decree until paid, if so much there be, and that the residue of said monies, if any there be, be deposite' with the clerk of this court, subject to the further order of this *of the* court, and that in case the complainant be the highest bidder, he, the said Henry Starr, take his receipt for the amount of his respective bidds or purchases, and file the same with the clerk of this court, and with the papers in this suit, and that he report his proceedings herein at the next term of this court.

And it is further ordered, adjudged, and decreed by the court that the defendants in this cause who are infants under the age of twenty-one years have one year after they shall severally arrive to the age of twenty-one years to show cause against this decree.

On the morning of this day the sheriff returned into court a
96 panel of grand jurors, and on calling over the same the following persons answered and were sworn according to law, to wit: John Wood, foreman; Williard Keyes, David Dutton, John Burnett, William

Ross, Jeremiah Rose, Dexter Wheelock, John M. Smith, Nathaniel Hinckley, Rufus Brown, Daniel Whipple, Joshua Twichell, John T. Smith, Daniel Moore, Joshua Davis, and Ebenezer Smith.

Ordered, that court adjourn to nine o'clock to-morrow morning.

TUESDAY MORNING, *October 8th*, 1822.

Court opened according to adjournment. Present the same as before. The service of copies of certain rules entered of record is proved by the oath of Levi Roberts on Leonard Ross, Daniel Whipple, and David Dutton, a county commissioner.

ROBERT SIMPSON, COMPLAINANT,
vs.
SUSAN O'HARA AND OTHERS, defendants. } In chancery.

This day came the complainant by his counsel, and it appearing to the court that the order made at the last term for the appearance of
97 the said defendants has been regularly inserted three weeks successively in the Edwardsville Spectator, and the defendants not having entered their appearance herein or answered the complainant's bill, on motion of counsel for the said complainant, it is ordered by the court that said bill , and the same is hereby taken for confessed against them.

And the court being satisfied that the said William M. O'Hara, deceased, did, on the seventeenth day of May, one thousand *and* eight hundred and twenty-one, execute to the complainant the writing set forth in the bill, and there is due to the complainant the sums of money in the bill mentioned, the court therefore order, adjudge, and decree that the several quarter-sections and half-sections of land set forth and described in the bill of complaint, with all their appurtenances, be sold at public auction to the highest bidder, or so much thereof as will be sufficient to pay the complainant the said sum of money alledged in the bill due him, together with the expenses of such sale and the costs of this suit.

And for the purpose of carrying this decree into execution, it is
98 ordered by the court that Henry Starr be, and he is hereby, appointed a commissioner to superintend and direct the sale of said quarter-sections and half-sections of land, with all their appurtenances, at the court-house in the town of Edwardsville, in Madison County, giving three weeks' previous notice of the time of such sale in such manner as he shall choose, on or before the first day of May next, and that he execute deed or deeds to the purchaser or purchasers thereof, and that with the proceeds of such sale he pay the said sums of money alledged in the bill to be due to the complainant, also the costs of this suit, together with the expenses of such sale, and that if there be any residue in his hands he deposit it with the clerk of this court to abide any order of the court which may be made concerning it.

99 (Here commences page 28, of volume 1, or Book A, of record of the proceedings of Pike circuit court.)

At a circuit court, began and holden at the town of Atlas, within and for the county of Pike, on the first Thursday after the fourth Monday in the month of April, in the year of our Lord one thousand eight hundred and twenty-three: present, the hon'ble Thomas Reynolds, chief justice.

The sheriff of the county returned into court a panel of grand jurors, which was called over and the following persons appeared and were charged and sworn to enquire of all offenses against the laws of this

State within the county of Pike, to wit: Daniel D. Smith, foreman; David Dutton, Bigelow C. Fenton, Joshua Twichell, Simon Crosier, Thomas Church, William Mettz, John Mettz, Amos Ferris, Garnet Van Dusen, David H. Read, Jean B. Tebo, James Devine, George Kelley, Daniel Thusong, Levi Roberts, and Jeremiah Smith.

Nicholas Hanson is admitted by the court to prosecute for the present term.

THE PEOPLE
vs.
THOMAS R. BRASHEAR. } Presentment for contempt.

100 The court in this cause, having heard the proofs and allegations of the parties, but not being advised thereupon, took time to consider.

THE PEOPLE
vs.
LEONARD ROSS. } Information in nature of quo warranto.

Ordered that this cause be continued until next term.

SAME
vs.
DANIEL WHIPPLE. } Information, &c.

SAME
vs.
DAVID DUTTON. } Information, &c.

In these cases same order as the foregoing.

JOSIAH S. BRIGGS
vs.
MICHAEL DONSEMAN. } On foreign attachment.

Ordered that this cause be continued to next term, and that the plaintiff (end of page 28 of said Book A, or volume 1 of said record. Here commences page 29 of said volume 1, Book A, of said record, &c.) cause a notice to be inserted three weeks successively in the Edwardsville Spectator, agreeably to the statute in such case provided.

101 JOHN GILES
vs.
JOHN SHAW.

By consent of parties this cause is continued to next term.

DANIEL D. SMITH
vs.
JOHN SHAW.

By consent of both the parties this suit is dismissed at the costs of the defendant, the costs to estimated up to the twenty third day of April last, and also the costs of dismissing this suit at the present term.

Therefore it is considered by the court that the said plaintiff recover against the said defendant his costs by him about his suit in this behalf expended; and the said defendant in mercy, &c.

GEORGE W. BUTTON
vs.
THOMAS MCCRANEY. } On appeal.

The court having heard the proofs and allegations of both the parties in this case, and having considered the same, is of opinion that the judgment of the court below be affirmed for the sum of fourteen dollars and ninety-three cents and three-fourths of a cent. Therefore it
102 is considered by the court that the plaintiff recover the sum aforesaid, and also his costs by him about his suit in this behalf expended; and the said defendant in mercy, &c.

JOHN P. CABANNE
vs.
SUSAN O'HARA, WIDOW, AND OTHERS, THE children and heirs of William M. O'Hara, deceased, defts. } In chancery.

On reading the report of Henry Starr, commissioner in this cause, of his proceedings herein, under a decree of this court made at the last term, it is ordered by the court that the doings of the said Starr, as commissioner aforesaid, stand confirmed, and that his report be put on file.

THE PEOPLE, &C.,
vs.
MASON COCKERELL. } Indictment for a riot.

Ordered that this cause be continued to next term.
(End page 29 of said record.)
(Here commences page 30 of said record book, volume 1, Book A.)

DANIEL D. SMITH
vs.
MASON COCKERELL. } Action of trespass, assault & battery.

103 By consent of both parties in this cause the same is continued to next term at the cost of the defendant.
Therefore it is considered by the court that the said plaintiff recover against the defendant his costs of the present term by him about his suit in this behalf expended, to be taxed, &c. Ordered that Daniel Lill be fined in the sum of fifty dollars for a contempt of this court.

JAMES W. WHITNEY
vs.
JOHN SHAW. } In case.

Ordered by the court that this cause be continued to next term at the costs of the defendant. Therefore it is considered that the plaintiff recover his costs by him about his suit in this behalf expended at the present term, to be taxed, &c. And it is further ordered that the defendant have leave to file special pleas at the next term, and no other, as to

the two first counts of declaration, he having filed no pleas at the present term owing to the absence of his counsel.

104 HENRY HOPKINSON
vs.
DANIEL D. SMITH AND ELI B. CLEUSON, administrators of Aaron T. Crane, deceased. } In case.

This day came the plaintiff in his proper person, and the defendants also appeared in open court, but said nothing in bar or preclusion of the plaintiff's action, but confessed judgment for the sum of one hundred and twenty-two dollars and thirty-four cents. It is therefore considered by the court that the said plaintiff recover against the said defendants the said sum of one hundred and twenty-two dollars and thirty-four cents, his damages by him sustained, and also his costs by him about his suit in this behalf expended, the said damages to be levied and made of the assets may come into the hands of the said administrator in future.

(Here ends page 30 of said record.)

(Here commences page 31 of said record-book, volume 1, Book A.)

JOHN P. CABANNE
vs.
SUSAN O'HARA AND OTHERS. } In chancery.

105 This day Henry Starr in open court acknowledged that as a commissioner under a decree of this court in the above cause he had executed a deed of conveyance to Thomas Prinum bearing date the first day of March, A. D. 1823, also a deed of conveyance to John L. Rogers, of the same date, also a deed of conveyance to the said John P. Cabanne, of the date of the twentieth of February, A. D. 1823, and also a deed of conveyance to John Springer, of the said last-mentioned date, and thereupon the court allow and approve of said deeds and order the acknowledgment to be certified.

Ordered that court adjourn to nine o'clock to-morrow morning.

FRIDAY MORNING, MAY *the 2nd*, 1823, &c.

106 STATE OF ILLINOIS.

Pike circuit court of the term of April, 1822.

JOHN P. CABANNE
vs.
SUSAN O'HARA, THE WIDOW, AND OTHERS, THE children and heirs at law of William M. O'Hara, deceased. } In chancery.

To the honorable Joseph Phillips, chief-justice:

Humbly complaining sheweth unto your honor your orator, John P. Cabanne, of the city of St. Louis, Missouri, that on or about the -- day of September, A. D. 1820, William M. O'Hara, of the said city of St. Louis, was seized or pretended to be seized in fee of all those certain lots, pieces, or parcels of land hereinafter mentioned. And your orator further sheweth unto your honor that, on the said last aforesaid, the said William M. O'Hara, by his certain promissory notes or obligations in

writing duly made and executed, became justly indebted unto your ora
tor, and promised and agreed to *to* pay to your orator the sums of
107 money as set forth in and by said promissory notes and obliga-
tions, which said notes and obligations are now in the custody of your orator, and ready to be produced as this honorable court shall direct.

And your orator unto your honor further sheweth that the said William M. O'Hara and Susan, his wife, in order to secure the payment of the said principal sums of money with lawful interest, executed two certain indentures of mortgage to your said orator, now in the custody of your orator and ready to be produced and shown to your honor, and did thereby grant, bargain, sell, alien, release, enfeoff, convey, and confirm unto your orator, and to his heirs and assigns forever, all those certain lots, pieces, or parcels of land in said mortgage contained and described, as by reference to same will more fully appear, together with all and singular the rights, members, privileges, hereditaments, and appurtenances thereunto belonging or in any wise appertaining; and also all the the estate, right, title, interest, dower-property, possession, claim, demand, and equity of the said
William M. O'Hara and Susan O'Hara, his wife, of, in and to the
108 same, and the reversion, reversions, remainder, and remainders,
rents, issues, and profits thereof; to have and to hold the said described premises, with all and singular the rights, members, privileges, hereditaments, and appurtenances thereunto belonging unto your orator, his heirs and assigns forever, provided always, and the said indentures of mortgage and the real estate and property thereby granted were upon this condition nevertheless, that if the said William M. O'Hara, his heirs, executors, or administrators, shall well and truly pay, or cause to be paid, unto your orator, his executors, administrators, heirs, or assigns, the sums of money mentioned in the said notes or obligations at the time and in the manner therein mentioned and set forth, according to the true intent and meaning thereof, that then and from thenceforth the said indentures of mortgage and the estate thereby granted and everything therein contained should cease, determine, and be absolutely void to all intents and purposes.

And it was by the said indentures of mortgage mutually
109 covenanted and agreed by and between the said William M.
O'Hara and your orator that if default should be made in the payment thereof, according to the tenor and effect of the conditions mentioned in said notes or obligations at the time specified for the payment thereof, according to the tenor and effect of the condition of said notes and indentures of mortgage, that then and from thenceforth it should be lawful for your orator, his heirs, executors, administrators, and assigns to enter into and upon all and singular the premises by the said indentures of mortgage granted or intended so to be, and to grant, bargain, sell, and dispose of the same, and all benefit and equity of redemption of the said William M. O'Hara, his heirs, executors, administrators, or assigns therein, at public auction, and to make, seal, execute, and deliver to the purchaser or purchasers thereof a good and sufficient deed or deeds of conveyance in fee simple, and out of the money arising from such sale to retain the principal and interest which should then be due on the said notes,
or obligations, and indentures of mortgage, according to the con-
110 ditions thereof, together with all the costs and charges of advertisement and sale of same, the surplus of the purchase-money, if any there should be, to be paid unto the said William M. O'Hara, his heirs, executors, administrators, or assigns; which sale, so to be made, should be a perpetual bar both in law and equity against the said William

M. O'Hara, his heirs and assigns, and all persons claiming or to claim said lands and real estate and every part thereof, by, from or under them or any of them, as in and by said indentures of mortgage duly executed by the said William M. O'Hara and Susan, his wife, under their respective hands and seals, and now in the possession of your orator, ready to be produced and proven as the honorable court shall direct, reference thereto being had, will more fully and at large appear.

And your orator further sheweth unto your honor that the said William M. O'Hara, deceased, at or near the post of Arkansas, on or about the 1st of July, A. D. 1821, and that the widow and child-
111 ren, heirs at law of the said William M. O'Hara, are now residents of the State of Illinois, and that all the principal money mentioned in the said notes and indentures of mortgage, and secured thereby, together with the interest thereof, still remain and owing, no part thereof having been paid or satisfied to your orator, by means of which said several premises, the said indentures of mortgage, and the estate thereby mortgaged to your orator, came absolute in your orator, his executors, administrators, and heirs.

But now, so may it please your honor, that the said Susan O'Hara, widow of the said William M. O'Hara, and others, the children and heirs of the said William M. O'Hara, confederating and combining with divers other persons, at present unknown to your orator, but whose names when discovered your orator prays may be inserted here, and that they may be made parties hereto, with proper and fit words to charge them, how to injure and ag'rieve your orator in the premises and to
112 cheat and defraud him of the said interest and principal monies as aforesaid due to your orator on the said *said* notes and indentures of mortgage hereinbefore mentioned, pretending that the said principal sum of money, so due to your orator as aforesaid, and interest thereof, have been paid off and discharged, and thereby that the said notes and indentures of mortgage have become void, and that your orator's estate, title, and interest in the premises have become totally extinguished, all which acts and doings are contrary to equity and good conscience, and tend to the manifest wrong, and injury, and oppression of your orator.

In tender consideration whereof, and forasmuch as your orator has not a complete and safe remedy at common law, nor can safely sell said mortgaged premises for the payment and satisfaction of the said principal and interest money so as aforesaid due to your orator, as per said notes and indentures of mortgage in manner aforesaid.

To the end, therefore, said Susan O'Hara and the children and heirs of the said William M. O'Hara, deceased, and their confederates
113 when discovered, upon their respective several corporal oaths, true, full, and perfect answers make to all and singular the said premises as fully and particularly as if the same were here again repeated and they thereto particularly interrogated according their respective knowledge, information, remembrance, or belief, and that the said Susan O'Hara and others, the children and heirs at law of the said William O'Hara, may be decreed to pay to your orator the said principal sums on said mortgaged premises mentioned, and due on said notes and indentures of mortgage, and all interest money now due or to grow due thereon, together with all your orator's costs and charges in this behalf sustained, by a short day appointed by this honorable court, due publication having been first made according to law, and in default thereof that the said Susan, wife of the said William M. O'Hara, deceased, and others, the children and heirs at law of the said William M. O'Hara, and each of them, or either

of them, may be foreclosed of and from all equity of redemption and claim of, in, and to the said mortgaged premises, and every part and parcel thereof, with the appurtenances, and all and singular the said mortgaged premises, with the appurtenances, may by the order and decree of this honorable court be sold, and out of the moneys arising from the sale thereof your orator may be paid the full amount of the principal sums in said mortgage mentioned and expressed, and due to your orator by virtue of said mortgages, together with all interest thereon due or to become due thereon, and as well as all your orator's costs and charges in this behalf sustained, and that your honor may cause such writ, subpœna, or other process to issue, or due publication to be made upon the said Susan O'Hara and others, the children and heirs of the said William M. O'Hara, deceased, as may be required by equity, law, and the statute in such cases made and provided, and that your orator may have such other and further relief as to your honor may seem proper and shall be agreeable to equity and good conscience, and your will ever pray.

HENRY STARR,
Solicitor.

Filed April 23d, 1822.

J. W. WHITNEY, *Clerk.*

STATE OF ILLINOIS, *County of Pike, ss :*

I, George W. Jones, clerk of the circuit court within and for said county, and ex-officio recorder of deeds, do hereby certify that the above and foregoing pages contain a true, full, complete, and perfect copy of pages 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and part of page 21 of book A, or volume 1, of the record of the proceedings of the Pike circuit court, and that pages 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, & 21 of the above and foregoing pages are each and severally full, complete, and perfect copies of the pages 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, & the first part of page 21 of said record-book A, or volume 1, of the records of the proceedings the Pike circuit court in the office of the circuit clerk of said county, page 1 of this instrument corresponding and being the same as page 1 of said record-book, and page 2 of this instrument same as page 2 of said record-book, and that each of the pages aforesaid of this instrument are the same as the corresponding pages of said record-book, up to and including 20 and 21, as to part of said page 21, and that page 22 of the above and foregoing instrument is a full, perfect, and complete copy of page 28 of said record-book, and page 23 of the above and foregoing instrument is a full, perfect, and complete copy of page 29 of said record-book, and that page 24 of the above and foregoing instrument is a full, perfect, and complete copy of page 30 of said record-book, and also page 25 of the above and foregoing instrument is a full, perfect, and complete copy of all that portion of page 31 of said record-book which contains the proceedings of the first Thursday after the fourth Monday of April, A. D. 1823, as far as said proceedings of said court are recorded on said page 31 of said record-book, and that the other and remaining pages of said above instrument contain a full, true, and complete copy of a certain bill in chancery now in my office, and endorsed as follows:

"John P. Cabanne vs. Susan O'Hara et al." "Filed April 23rd, 1822. J. W. Whiting, clerk." The said bill being part of the files of the office of said circuit clerk of said county, and that I am acquainted with the handwriting of said J. W. Whitney, & belief that the signature to said

endorsement of the said J. W. Whitney is in his own proper handwriting & genuine; and I further hereby certify that the above and foregoing pages contain a true, perfect, and complete copy of all the record-proceedings, and of all the bills, writs, process, notices, subpœnas, or other papers or exhibits of any kind which I can find in clerk's office of the circuit court for said county relating to or pertaining in any manner to a certain case in said court in which John P. Cabanne was complainant and Susan O'Hara and others were defendants, or in
118 which the said John P. Cabanne was complainant and Susan O'Hara, the widow, and others, the children and heirs at law of William M. O'Hara, deceased, were defendants; and also that pages 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, & 21 contain a full, true, and perfect copy of all the proceedings in the circuit court of Pike County, Illinois, from and including the first setting or commencement of the existence of said Pike circuit court, up to and until the 8th day of October, A. D. 1822, and of the first portion of the proceedings of the said circuit court on the 8th day of October, A. D. 1822, as far as the same are shown by the records of my office in said record-book A, or volume 1, of the proceedings of said circuit court; and also that there is no case in records of my office in which John P. Cabanne was complainant and Susan O'Hara and others were defendants, except as the same is found in above and foregoing instrument, and that said record-book A, or volume 1, of the proceedings of said circuit court, contains all recorded proceedings of said circuit court from and in-
119 cluding its first sitting or commencement of the existence of said Pike circuit court up to and until the close of the April term, A. D. 1835, of said circuit court, being the only record-book of said proceedings during said period.

Given under my hand and seal of said court at my office in Pittsfield, Ill., this 29th day of March, A. D. 1873.

[SEAL.] GEO. W. JONES, *Clerk.*

120 The plaintiff then read in evidence a copy of the Edwardsville Spectator, dated the eighth day of February, 1823, containing the following notice, to wit:

121 *Public sale.*

Pursuant to a decree in chancery of the circuit court of Pike County made at the October term, 1822, in a cause wherein John P. Cabannie is complainant and Susan O'Hara, widow, and others, the children and heirs at law of William M. O'Hara, deceased, are defendants, as a commissioner appointed for that purpose by said decree, I shall expose to public sale at the court-house in the town of Edwardsville, on Thursday, the 20th day of February next, at 11 o'clock a. m. of that day, (for cash to be paid down,) sixty-six quarter-sections of land situated in different parts of the tract appropriated for military-bounty lands in the State of Illinois, and which were conveyed by the said O'Hara in his lifetime to the said Cabbanne, by way of mortgage to secure the payment of $5,093.

The patents for these lands are in my possession, and the title can be satisfactorily ascertained, as also their situation, and in some meas-
122 ure their quality, by application at my office in Edwardsville, 8th January, 1823.

HENRY STARR,
Commissioner.

123 This was all the evidence in the case.

Thereupon the plaintiff moved the court to exclude from the jury the mortgage dated in September, 1820, purporting to be executed by William M. O'Hara and Susan, his wife, to John P. Cabanne, because its execution was not proved nor was it proved or acknowledged according to law, nor was the plaintiff estopped from denying its execution so as to dispense with such proof, but the court overruled the motion and refused to exclude it from the jury, and held that it was proved and acknowledged as required by law, to which decision the plaintiff excepted.

Thereupon the plaintiff moved the court to exclude from the jury the deed from Henry Starr, commissioner, to John P. Cabanne, because its execution was not proved according to law nor was acknowledged in the manner required by law, but the court overruled the motion, to which decision the plaintiff excepted.

Thereupon the plaintiff asked the court to instruct the jury that upon the undisputed facts in this case the law would presume the
124 mortgage of O'Hara to Cabanne, dated September, 1820, to have been satisfied and paid before the year 1861, but the court refused to do so, and the plaintiff excepted.

And thereupon the court charged the jury, and, after giving the reasons for the conclusions, the charge of the court was:

"I therefore decide that the decree in the Pike County circuit court, given in evidence, and the sale under it, extinguished the right of the defendants therein, the heirs *of* law of William M. O'Hara, under whom the plaintiff in this case claims."

But with this the court left to the jury to determine from the evidence whether or not the mortgages described in the record from the Pike County circuit court were the same mortgages now offered in evidence by the defendants who had introduced certified copies of said mortgages, and directed the jury to find for the defendants in case they determined that they were the same instruments, but if they found they were not, then it was necessary to consider another defence
125 set up, namely, the mortgage executed by William M. O'Hara and his wife to John P. Cabanne, dated September , 1820, and the claim of possession thereunder by the defendants.

After stating to the jury that the mortgage was in evidence, the court proceeded:

"You will next inquire whether the defendants are in under that mortgage so as to assert the rights of the mortgagee, and as the right to do so is claimed under the conveyance given in evidence, purporting to be executed by certain parties claiming to be heirs at law of the mortgagee, you are first to ascertain whether the mortgagee is dead, and whether the persons executing this deed were his heirs at law, or any portion of them. I suppose if any portion of them transferred their interest in these premises, or put a party in possession under them, or gave a license for any person to occupy those premises under them as mortgagees, such persons so occupying and in possession would have the right to assert the rights of the mortgagee. If, then, there was a license to these parties to enter under the mortgagees, and they
126 did enter and hold under them, then I think they are substituted in the place of, and can assert the rights of, the mortgagee.

This mortgage, it seems to me, should be considered in law as a part of the assets going to the mortgagee's representatives. The heir as an heir has no more interest in the assets than a third person, only prospectively.

He has none until the debts are all paid; nothing which the law recognizes as a title or right in him, and therefore it is claimed upon that doctrine, that although Cabanne may have been a mortgagee, and may have had a right to enter himself, still, the heirs, until the estate was settled by a decree, and distribution had been made by which the title would pass to them, would have no right to the possession of that property or to the mortgage.

This proceeds upon the ground that it is nothing but a chose in action, passing as part of the assets, and not as a part of the real estate, to the heirs.

Had Mr. Cabanne been in possession himself, it is not con-
127 tended but that a good defence would have existed as to him; suppose that he had died leaving his family and his heirs at law in possession, would they not be in a position to assert the right and maintain it the same as Cabanne; would the death of the mortgagee give to the mortgagee the right to proceed in ejectment against his heirs thus in possession?

It seems to me not. I think they would have the right, having the legal estate coupled with possession, to maintain it. And in this case the property being vacant, and presumptively in the possession of the mortgagee, who is regarded as having the legal title, (as possession is presumed to follow the legal title,) I think the heirs would have the right as against the mortagor (perhaps not against the administrator) to assert the possession and transfer it by conveyance.

If they had a right to the possession, they had a right to put any one else in, and a conveyance of the kind given in evidence would be
128 equivalent to a license to the purchaser to enter, if nothing more.

So I charge you as a matter of law that if you find that the heirs at law, or a part of them, executed this conveyance to these parties, it operated at least as a license, and if you find the defendants in possession under that, they have the right to maintain the possession as against the mortgagor.

Upon that question it is claimed that there is no evidence to show that they entered or held under this mortgage.

It is claimed by the plaintiff, and the proof shows, that they purchased of a third person and were in possession in 1857; that in 1861 they took the deed of Nettleton, and that while in possession they brought this in as an outstanding title. I think that does not change their legal rights. I think if they are in possession under any right, under any title derived from mortgagee, it gives them the right of possession as against the mortgagor.

The mortgagor cannot disturb them until he pays the mortgage; then he can be restored to his estate."

129 "It is claimed that although no statute of limitations has barred the right to recover, still the common-law presumption of payment, after the lapse of twenty years, has cut off the right of these parties to assert this mortgage at this date. It is true the common law, after the lapse of twenty years, presumes payment of a debt under seal, but that is a presumption which may be rebutted.

It may be proven as a matter of fact that the debt is not paid, the party asserting the debt having the affirmative, and if that be proved he may still recover. He is not confined to proving actual non-payment, but he may prove it by circumstances. He may show such circumstances as to warrant a jury in finding that it has not been paid.

If this mortgage had been paid before these parties asserted any right under it, before 1861; if it was not a valid and subsisting mort-

130 gage at that time, I don't think the mortgagee would have any right to enter.

The plaintiff claims it was presumptively paid. How does the evidence bear upon that?

The foreclosure suit was properly received for the purpose of establishing an assertion or claim on the part of the mortgagee as against the mortgagor's estate after his death, from which you might infer that the mortgage had not been paid up to that time. At his death, as the evidence shows, the mortgagor left four or five children very young, who remained for a short time in St. Louis and then went with their mother to New York.

Their mother soon afterwards died, and after living for a short time with their grand parents they were scattered (on their death) to different sections of the country. Three of the children died before majority, or about the time they arrived at majority, leaving surviving of that family but one, the witness in this case, who married, in 1840, an officer in

131 the United Navy, and remained abroad & located at different points from that time up to the time of her husband's death in 1871. There is no evidence that any of the family have ever paid any attention to or looked after this land at all. They have been absent from the State during all this long period. Now it is for you to say whether, upon these circumstances, you are warranted in presuming that the mortgage had not been paid.

If upon these facts you are satisfied that the mortgage had not been paid, the case will be relieved of that question, & the defendant would be entitled to recover upon the second branch, if you find that the party was in possession under this Cabanne mortgage in the manner I have stated.

The question as to the payment after they had gone into possession is immaterial in this case, for there is no pretence that the surviving heir has ever done anything.

132 The payment rests entirely upon presumption arising from lapse of time, and are there any circumstances given in evidence to rebut that presumption? If the presumption is satisfactorily rebutted in your judgment, then, as I charged you before, the defendant being in possession under the mortgage, and claiming under it, whether he owns the land or not, if he is in by license or authority of the mortgagee, or persons representing the mortgagee, the defendant is entitled to a verdict."

Be it further remembered that the plaintiff excepted to that part of the charge which stated to the jury that the decree in the Pike County circuit court and the sale under it extinguished the right of the heirs at law of William M. O'Hara.

And also to that part of the charge which held that the execution of a deed by a part of the heirs at law of John P. Cabanne was equivalent to an execution by all, and constituted a valid defence for the defendant to all of the land the same as if executed by all.

133 And also to that part of the charge which held that the legal title to the land was vested in the mortgagee, Cabanne, and that, the land being vacant and unoccupied, the mortgagee was in the constructive possession of the land, or that his heirs were, or that the heirs had a right to possession.

And also to that part of the charge which informed the jury that the purchase by the defendants, after they were in possession under another claim of title, as disclosed by the evidence of Nettleton, constituted a possession under the mortgage.

Also to that part of the charge which undertook to recapitulate the evidence to rebut the presumption of payment arising from the lapse of time, and particularly to that part which held that the jury could consider the proceedings in Pike County, whether effectual to divest the title of O'Hara's heirs or not.

134 And the plaintiff also excepted to the charge, because the court omitted and refused, although requested so to do, to charge the jury that there was a presumption that the debts secured by the mortgages was paid in due course of administration of the estate of O'Hara, in the State of Missouri.

And thereupon the jury rendered a verdict in favor of the defendants, and the plaintiff moved for a new trial, which was overruled, and exception taken by the plaintiff, and judgment was entered on the verdict.

And forasmuch as the foregoing facts do not otherwise appear of record, the plaintiff prays that this his bill of exceptions be signed and sealed by the court, which is accordingly done.

J. C. HOPKINS, [SEAL.]
U. S. Dist. Judge, presiding.

(Endorsed:) Filed April 23d, 1873. Wm. H. Bradley, clerk.

135 On this day, to wit, the 23d day of April, A. D. 1873, said plaintiff, by his attorneys, filed in said clerk's office his bond in said entitled cause, which said bond is in words and figures following, to wit:

UNITED STATES OF AMERICA:

Circuit court of the United States for the northern district of Illinois.

GEORGE A. KIBBE
vs.
SAMUEL DITTO AND AMOS DUNN. } In error.

Know all men by there presents that we, George A. Kibbe, of Springfield, Massachusetts, as principal, and Rodolphus K. Turner, of Quincy, Ills., and William C. Gondy, of Chicago, Illinois, as surety, are firmly bound unto Samuel Ditto and Amos Dunn in the penal sum of five hundred dollars, to the payment of which, well and truly to be made to the said Samuel Ditto and Amos Dunn, their legal representatives and assigns, we do hereby bind ourselves, our heirs, executors, and

136 administrators, jointly and severally, firmly by these presents.

Witness our hands and seals this 23d day of April, A. D. 1873.

The condition of the foregoing obligation is such, that whereas the above-named principal obligor has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the said circuit court in the above-entitled cause, at the March term thereof, for the year A. D. 1873.

Now, therefore, if the said George A. Kibbe, the said principal obligor, shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise of full force & effect.

GEORGE A. KIBBE. [SEAL.]
By RODOLPHUS K. TURNER,
His attorney in fact.
RODOLPHUS K. TURNER. [SEAL.]
W. C. GONDY. [SEAL.]

Approved:

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed April 23d, 1873. Wm. H. Bradley, clk.

137 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in said entitled cause, wherein George A. Kibbe is plaintiff and Samuel Ditto and Amos Dunn are defendants, as appears from the records of said court remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at my office, in the city of Chicago, in said district, this 26th day of September, A. D. 1873, and of our Independence the 98th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

138 Circuit court of the United States, northern district of Illinois.

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court, before you, between George A. Kibbe, plaintiff, and Samuel Ditto and Amos Dunn, defendants, a manifest error hath happened, to the great damage of the said George A. Kibbe, as by his complaint apppears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme
139 Court, to be then and there held, that, the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done. Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, this twenty-third day of April, A. D. 1873, and of our Independence the 97th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

We hereby waive service of any citation upon the defendants in error.

T. G. FROST & GEO. O. IDE,
For Defts. in Error.

(Indorsed:) Circuit court U. S., northern dist. Illinois. George A. Kibbe vs. Samuel Ditto et al. Writ of error.

(Indorsement on cover:) No. 288. George A. Kibbe, plaintiff in error vs. Samuel Ditto and Amos Dunn. N. Illinois C. C. U. S. Filed 1 October, 1873.

IN THE

UNITED STATES SUPREME COURT.

OCTOBER TERM, A. D. 1875.

GEORGE A. KIBBE,

v.

SAMUEL DITTO AND AMOS DUNN.

Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT.

W. C. GOUDY,

Att'y for Plaintiff in Error.

CHICAGO:

BULLETIN PRINTING COMPANY, 132, 134 & 136 Monroe St., cor. Clark.

1875.

UNITED STATES SUPREME COURT.

OCTOBER TERM, A. D. 1875.

GEORGE A. KIBBE,
vs.
SAMUEL DITTO and AMOS DUNN.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

I.

STATEMENT OF THE CASE.

On the 4th day of March, 1872, the plaintiff in error, George A. Kibbe, commenced an action of ejectment against the defendants in error, Samuel Ditto and Amos Dunn, to recover the southeast quarter of section nineteen, in township thirteen, north, of range three, west of the 4th principal meridian, situated in Mercer county, Illinois, in the Circuit court for the Northern District of Illinois. (Record 12.)

The defendants pleaded not guilty. (Record 3.)

At the April term, 1873, the cause was tried before a jury, Hon. James C. Hopkins, District Judge for the Western

District of Wisconsin, presiding, and a verdict and judgment for the defendant were rendered. (Record 4–5.)

Upon the trial, the plaintiff proved a title, derived from the United States, to be in William M. O'Hara, in fee, who acquired the same by a deed of September 12, 1820, executed by Nathaniel Abbott. The deed embraced sixty-two quarter sections of land in the military bounty tract in Illinois, and forty-four of these quarter sections were described in the two mortgages hereafter mentioned. This deed was recorded in Pike county, May 9, 1821, and at that time all of these tracts were situated in that county.

The plaintiff then proved that William M. O'Hara died in Missouri in the summer of 1821, intestate, leaving Susan O'Hara his widow, and four infant children. The widow died in the spring of 1822. All of the children died during minority, intestate, and without having been married and without issue, except Helen O'Hara, who inherited all of the property of her father. Helen O'Hara married Abram D. Harrel, September 23, 1840, who was a commander in the U. S. navy, and who died December 16, 1871, at Washington, leaving his wife surviving.

The plaintiff proved a conveyance of the land described in the declaration, by a deed dated May 2, 1868, executed by Abram D. Harrel and Helen O'Hara Harrel to the plaintiff. (Record 5–6.)

The defendants read in evidence a certified copy of an instrument dated on the —— day of September, 1820, purporting to be executed by Wm. M. O'Hara and Susan O'Hara, and to convey to John P. Cabanne fifty quarter sections all situated in Madison county, Illinois, between the

Illinois and Missouri rivers, describing as one of the tracts "the southeast quarter of section number nineteen in township number thirteen, north of range number three west," and giving similar numerical descriptions of the other forty-nine tracts; and the conveyance purported to be made to secure the payment by William M. O'Hara and Thomas Collet of $5,093.33, agreeably to the terms of three promissory notes of that date, each of which is for $1,697.78, and payable, one note at seven months, one at ten months, and the other at twelve months after date. (Record 6–9.)

Evidence was then introduced tending to show a foreclosure of the mortgage by proceedings in the Circuit court of Pike county, Illinois.

This evidence consisted of: *First.* A certified copy of a mortgage dated April 13, 1821, purporting to be executed by William M. O'Hara and Susan O'Hara, his wife, to John P. Cabanne, and to convey sixteen quarter-sections in the tract appropriated for military bounties in the State of Illinois, describing them, but not including the tract in controversy in this suit, to secure the payment of the same indebtedness mentioned in the former mortgage.

This mortgage was acknowledged before a notary public for the State of Missouri, residing in St. Louis.

The plaintiff objected to this certified copy as evidence, because it was not properly proved or acknowledged, and it was immaterial, the land in controversy not being described in it, but the court allowed it, and the plaintiff excepted. (Rec. 9–10.)

This evidence consisted of: *Second.* Certified copies from the records of the Circuit court of Pike county, showing

orders entered in the case of John P. Cabanne, complainant, *v.* Susan O'Hara and others, defendants, on the 23d day of April, 1822, the 7th day of October, 1822, and in April, 1823.

The plaintiff objected to the copies from the Pike Circuit court records, because the proceedings did not embrace or relate to the land in controversy; because neither the plaintiff nor those under whom he claimed were parties or privies to such proceedings, and such proceedings were void for the want of jurisdiction of the persons of the defendants and the subject matter; but the court overruled the objections and allowed such copies to be read, to which the plaintiff excepted. (Rec. 11–14.)

This evidence consisted: *Third.* Of a certified copy of a deed dated February 20, 1823, and purporting to be executed by Henry Starr, appointed a commissioner by the Circuit court of Pike county, to John P. Cabanne, and purporting to convey fifty-two quarter-sections of land in the military bounty tract in Illinois, giving the numerical description, and including the tract in controversy in this suit, all of which were sold, as recited in the deed, for $390.

This deed had the following certificate, which was the only proof of execution, to wit:

"STATE OF ILLINOIS, PIKE COUNTY,
"Circuit Court, April Term, 1823.

"Be it remembered that, at this present term, Henry Starr acknowledged in open court that, as commissioner, he had executed the within deed for the purposes therein expressed, and thereupon the court allowed and approved of said deed, and ordered the acknowledgment to be certified by the clerk, which is accordingly done.

"Witness: James Whitney, Clerk of said court, this first day of May, A. D. 1823.

"(Signed) J. WHITNEY, Clerk."

The deed appeared to have been recorded in Warren county, September 23d, 1836, and the copy was certified by the clerk of the Circuit court of that county.

The plaintiff objected to the reading of the certified copy of this deed in evidence, because it was not proved or acknowledegd according to law; but the court overruled the objection and allowed it to be read, to which the plaintiff excepted. (Rec. 14-17.)

A more complete statement of the evidence tending to prove a foreclosure of the mortgage of September, 1820, from O'Hara to Cabanne is not made now, because the evidence offered at a subsequent stage of the trial by the plaintiff presented more of the record, and the charge of the court was based on the evidence as thus presented. A full statement of the evidence read on the part of the defendants will be made hereafter.

The defendants then proved that John P. Cabanne died at St. Louis in July, 1842, leaving children and grandchildren, who were his heirs at law; and that John P. Sarpy, of St. Louis, Mo., was the administrator of John P. Cabanne, and trustee for the heirs, and guardian for those who were minors. The deposition making this proof was received in evidence, subject to all legal objections as to the competency of any part thereof. (Rec., 19.)

The defendants then read in evidence a certified copy of a deed, dated April 1, 1861, executed by *five-sevenths* of the heirs at law of John P. Cabanne to Booth Nettleton, purport-

ing to convey, by quit-claim, the land in controversy, with *all* other lands in Illinois in which the grantors had an interest, for the consideration of $400.

The defendants then proved conveyances, dated in 1861, from Booth Nettleton to themselves. (Rec., 19.)

The defendants then read in evidence, as color of title, a deed, dated June 12, 1857, executed by George F. Harding to Joseph Mathews, purporting to convey the land in controversy. They also read a stipulation that the defendants and their grantors have been in possession of the premises, under color of title, for fifteen years last past, and paid all the taxes assessed thereon during that time, so as to bring them within the limitation law of 1839; and that such possession was by actual residence; and that prior to December, 1857, the premises were vacant and unoccupied. (Rec., 20.)

The defendants then read a deposition of Helen O'Hara Harrel, in which she testified that neither her father, mother, brothers or sisters ever lived in Illinois; and that her mother died in the spring of 1822, or early in the winter of 1823. (Rec., 21.)

The plaintiff then read in evidence a more complete record from the Pike Circuit court of the proceedings to foreclose a mortgage than that produced by the defendants. It is shown to be *all* of the proceedings in existence.

The proof consists of a copy of the bill of complaint, and of the orders and decrees entered by the court, and also of the notice of sale by the commissioner. In exhibiting the orders and decrees, the entire record of that court in all causes before it, at the three first terms of court held in Pike county in

April, 1821, April and October, 1822, and all that is material at the next term, held in April, 1823.

As the instructions of the court below to the jury are based on all these judicial proceedings introduced in evidence, it seems best to state them as read by the plaintiff, as all of the record produced by defendants is here included.

The following is a correct statement of such judicial proceedings of the Pike Circuit court:

The bill of complainant is indorsed "John P. Cabanne v. Susan O'Hara, et al. Filed April 23rd, 1822. J. W. Whitney, Clerk." (Record 38.)

The caption of the bill is, "John P. Cabanne v. Susan O'Hara, the widow, and others, the children and heirs at law of Wm. M. O'Hara, deceased. In chancery." It is addressed to, "To the Honorable Joseph Philips, Chief Justice." (Record 35.)

The bill of complaint describes the complainant as John P. Cabanne, of St. Louis, Missouri, and states that on the —— day of September, 1820, William M. O'Hara, of St. Louis, was seized in fee of certain parcels of land thereinafter mentioned; that on said day William M. O'Hara by his certain promissory notes, became indebted to the complainant, which notes were in his possession and ready to be produced.

The bill then states that the said William M. O'Hara and Susan his wife, in order to secure the payment of said sums of money and interest, executed two certain indentures of mortgage to the complainant, then in his custody and ready to be produced, and did thereby convey all those lots, pieces, and parcels of land in said mortgage contained and described,

as by reference to the same will more fully appear, upon the condition that the said William M. O'Hara, his heirs, etc., should pay the promissory notes aforesaid; and it further stated that by the said mortgages it was mutually covenanted and agreed by and between the said William M. O'Hara and the complainant, that if default be made in the payment thereof, according to the tenor and effect of said notes and said mortgages that it should be lawful for the complainant, his heirs, etc., to enter into and upon the premises and to grant, bargain, sell, and dispose of the same, and all equity of redemption, etc., at public auction, and to make and deliver good and sufficient deeds to the purchasers, in fee simple, and out of the proceeds to retain the principal and interest due on said notes, together with the costs and charges of advertisement and sale, the surplus to be paid to William M. O'Hara, his heirs, etc., which sale shall be a perpetual bar both in law and equity against the said William M. O'Hara, his heirs, etc., as in and by said mortgages executed by the said William M. O'Hara and Susan his wife under their respective hands and seals, in possession of the complainant, ready to be produced, will more fully appear.

The bill further states that William M. O'Hara died about July 1st, 1821, and that his widow and children are non-residents of the State of Illinois, and that all of the principal and interest due on said notes was due and unpaid.

The bill prays *that Susan O'Hara and the children and heirs at law of the said William M. O'Hara, deceased, be made defendants*, (OMITTING TO GIVE THE NAMES OF ANY OF THE CHILDREN OR HEIRS), and that the equity of redemption be foreclosed, that the mortgaged premises be sold, and out of

the proceeds the complainant be paid the sum due him with interest and charges.

The bill is signed "Henry Starr, Solicitor." (Record 35-38.)

The first orders in the cause, entered of record, April 23, 1822, the first day of the term and the same day the bill was filed, read as follows, to wit:

"DANIEL C. BOSS, *Complainant*,
vs.
"JOHN ADAMS and ELIZABETH, his wife, *Defendants.* } *In Chancery.*

"It appearing to the court that the defendants in this cause are not inhabitants of this State, and they not having answered the complainant's bill, it is ordered by the court that they file their answers to said bill with the clerk of this court, on or before the first day of the next October term of said court, or that said bill will be taken for confessed against them. And it is further ordered that a copy of this order be published three weeks successively in the Edwardsville Spectator."

"ROBERT SIMPSON, *Complainant*,
vs.
"SUSAN O'HARA and others, *Defendants.* } *In Chancery.*

"JOHN P. CABANNE, *Complainant*,
vs.
"SAME, *Defendants.* } *In Chancery.*

Ordered, That the same notice be given in the two last cases as in the case immediately foregoing." (Rec. 25.)

The next order of record, entered October 7, 1822, the first day of the next term after the bill was filed, reads as follows, to wit:

"JOHN P. CABANNE, *Complainant*,
vs.
"SUSAN O'HARA and others, *Defendants.* } *Bill in Chancery.*

"This day came the complainant by his counsel, and it appearing to the court that the orders made at the last term for the appearance of the defendants in this cause has been published three weeks successively in the Edwardsville Spectator, as required by said order, and the defendants not having entered their appearance herein, or answered the bill of complaint, on motion of the complainant's counsel, it is ordered by the court that the said bill be, and the same is hereby, taken for confessed against them. And it appearing to the satisfaction of the court that there is due the complainant the sum of five thousand and four hundred and sixty-two dollars and twenty cents, by virtue of the three promissory notes and indentures of mortgage mentioned and set forth in the bill of complaint, being the principal and interest due on those notes;

"It is therefore ordered, adjudged and decreed by the court that the defendants pay to the complainant the said sum of five thousand, four hundred and sixty-two dollars and twenty cents, on or before the twentieth day of November next, together with the costs of this suit, to be taxed by the clerk; and, on such payment being made, that the complainant deliver up to the defendants to be canceled, the two deeds of mortgage set forth in the bill; but on failure, neglect or omission of the defendants to pay said sum of five thousand, four hundred and sixty-two dollars and twenty cents to the complainant, on or before the said twentieth day of November next, then and in that case it is further ordered, adjudged and decreed by the court that the said defendants, and each of them, be forever barred, foreclosed from all equity of redemption of,

in and to the mortgaged premises mentioned in the bill of complaint, and every part and parcel thereof.

"And it is further ordered, adjudged and decreed by the court that all and singular the several and respective mortgaged premises mentioned and described in the complainant's bill of complaint, with the appurtenances, being sixty-six quarter sections of land, be separately sold at public auction to the highest bidder.

"And, for the purpose of carrying this decree into execution, it is further ordered and decreed by the court that Henry Starr be, and he is, hereby appointed a commissioner to make sale of said mortgaged premises, as soon as may be convenient after the twentieth day of November next, at the court house, in the town of Edwardsville, in the county of Madison, giving three weeks previous notice of the time of such sale in the Edwardsville Spectator, published in said town, and also by placing a like notice on the door of said court house; and that he execute a deed or deeds to the purchaser or purchasers thereof; and that with the moneys arising from such sales, he pay to the complainant the said sum of five thousand, four hundred and sixty-two dollars and twenty cents, with interest thereon at the rate of six per cent. per annum from the date of this decree until paid, if so much there be; and that the residue of said moneys, if any there be, be deposited with the clerk of this court, subject to the further order of this court; and that in case the complainant be the highest bidder, he, the said Henry Starr, take his receipt for the amount of his respective bids or purchases, and file the same with the clerk of this court, and with the papers in this suit; and that he report his proceedings herein at the next term of this court.

"And it is further ordered, adjudged and decreed by the

court that the defendants in this cause, who are infants under age of twenty-one years, have one year after they shall severally arrive at the age of twenty-one years to show cause against this decree." (Rec., 30-31.)

The next orders of record, entered at the April term, 1823, are as follows, to wit:

"JOHN P. CABANNE
v.
"SUSAN O'HARA, widow, and others, the children and heirs of William M. O'Hara, deceased, *Df'ts.* } *In Chancery.*

"On reading the report of Henry Starr, commissioner in this cause, of his proceedings herein, under a decree of this court made at the last term, it is ordered by the court that the doings of the said Starr, as commissioner aforesaid, stand confirmed, and that his report be put on file."

"JOHN P. CABANNE
v.
"SUSAN O'HARA and others. } *In Chancery.*

"This day Henry Starr, in open court, acknowledged that, as a commissioner under a decree of this court in the above cause, he had executed a deed of conveyance to Thomas Prinum, bearing date the first day of March, A. D. 1823; also a deed of conveyance to John L. Rogers, of the same date; also a deed of conveyance to the said John P. Cabanne, of the date of the twentieth of February, A. D. 1823, and also a deed of conveyance to John Springer, of the said last mentioned date; and therepon the court allow and approve of said deeds, and order the acknowledgment to be certified." (Rec., 34-35.)

The only other official document is the notice of sale given by the commissioner in a newspaper called the Edwardsville

Spectator, published on the 8th day of February, 1823, which reads as follows, to wit:

"PUBLIC SALE.

"Pursuant to a decree in chancery of the Circuit court of Pike county, made at the October term, 1822, in a cause wherein John P. Cabanne is complainant and Susan O'Hara, widow, and others, the children and heirs at law of William M. O'Hara, deceased, are defendants, as a commissioner appointed for that purpose by said decree, I shall expose to public sale at the court house in the town of Edwardsville, on Thursday, the 20th day of February next, at 11 o'clock, A. M., of that day (for cash to be paid down) sixty-six quarter sections of land situated in different parts of the tract appropriated for military bounty lands in the State of Illinois, and which were conveyed by the said O'Hara in his lifetime to the said Cabanne, by way of mortgage to secure the payment of $5,093.

"The patents for these lands are in my possession, and the title can be satisfactorily ascertained, as also their situation, and in some measure their quality, by application at my office in Edwardsville, 8th January, 1823.

"HENRY STARR, Commissioner."

(Record 39.)

This is all the evidence. The plaintiff then moved the court to exclude from the jury the mortgage dated in September, 1820, purporting to be executed by William M. O'Hara and Susan, his wife, to John P. Cabanne, because its execution was not proved, nor was it proved or acknowledged according to law, nor was the plaintiff estopped from denying its execution so as to dispense with such proof, but the court overruled the motion and refused to exclude it from the jury,

and held that it was proved and acknowledged as required by law, to which decision the plaintiff excepted.

Thereupon the plaintiff moved the court to exclude from the jury the deed from Henry Starr, Commissioner, to John P. Cabanne, because its execution was not proved according to law nor was acknowledged in the manner required by law; but the court overruled the motion, to which decision the plaintiff excepted.

Thereupon the plaintiff asked the court to instruct the jury that upon the undisputed facts in this case, the law would presume the mortgage of O'Hara to Cabanne, dated September, 1820, to have been satisfied and paid before the year 1861, but the court refused to do so, and the plaintiff excepted.

And thereupon the court charged the jury, and, after giving the reasons for the conclusions, the charge of the court was:

"I, therefore, decide that the decree in the Pike county Circuit court, given in evidence, and the sale under it, extinguished the right of the defendants therein, the heirs at law of William M. O'Hara, under whom the plaintiff in this case claims."

But with this the court left to the jury to determine, from the evidence, whether or not the mortgages described in the record from the Pike county Circuit court were the same mortgages now offered in evidence by the defendants who had introduced certified copies of said mortgages, and directed the jury to find for the defendants in case they determined that they were the same instruments; but if they found they were not, then it was necessary to consider another defence set up,

namely, the mortgage executed by William M. O'Hara and his wife to John P. Cabanne, dated September , 1820, and the claim of possession thereunder by the defendants.

After stating to the jury that the mortgage was in evidence, the court proceeded:

"You will next inquire whether the defendants are in under that mortgage so as to assert the rights of the mortgagee, and as the right to do so is claimed under the conveyance given in evidence, purporting to be executed by certain parties claiming to be heirs at law of the mortgagee, you are first to ascertain whether the mortgagee is dead, and whether the persons executing this deed were his heirs at law, or any portion of them. I suppose if any portion of them transferred their interest in these premises, or put a party in possession under them, or gave a license for any person to occupy these premises under them as mortgagees, such persons so occupying and in possession would have the right to assert the rights of the mortgagee. If, then, there was a license to these parties to enter under the mortgagees, and they did enter and hold under them, then I think they are substituted in the place of, and can assert the rights of the mortgagee.

"This mortgage, it seems to me, should be considered in law as a part of the assets going to the mortgagee's, representatives. The heir, as an heir, has no more interest in the assets than a third person, only prospectively. He has none until the debts are all paid; nothing which the law recognizes as a title or right in him, and therefore it is claimed, upon that doctrine, that although Cabanne may have been a mortgagee, and may have had a right to enter himself, still, the heirs, until the estate was settled by a decree, and distribu-

tion had been made by which the title would pass to them, would have no right to the possession of that property or the mortgage.

"This proceeds upon the ground that it is nothing but a chose in action, passing as a part of the assets, and not as a part of the real estate, to the heirs.

"Had Mr. Cabanne been in possession himself, it is not contended but that a good defense would have existed as to him. Suppose that he had died leaving his family and his heir at law in possession, would they not be in a position to assert the right and maintain it the same as Cabanne; would the death of the mortgagee give to the mortgagor the right to proceed in ejectment against his heirs thus in possession?

"It seems to me, not. I think they would have the right, having the legal estate coupled with possession, to maintain it. And in this case the property being vacant and presumptively in the possession of the mortgagee, who is regarded as having the legal title (as possession is presumed to follow the legal title), I think the heirs would have the right, as against the mortgagor (perhaps not against the administrator), to assert the possession and transfer it by conveyance.

"If they had a right to the possession, they had a right to put any one else in, and a conveyance of the kind given in evidence would be equivalent to a license to the purchaser to enter, if nothing more. So I charge you, as a matter of law, that if you find that the heirs at law, or a part of them, executed this conveyance to these parties, it operated at least as a license, and if you find the defendants in possession under that, they have the right to maintain the possession as against the mortgagor.

"Upon that question it is claimed that there is no evidence to show that they entered or held under this mortgage.

"It is claimed by the plaintiff and the proof shows that they purchased of a third person, and were in possession in 1857; that in 1861 they took the deed of Nettleton, and that while in possession they brought this in as an outstanding title. I think that does not change their legal rights. I think if they are in possession under any right, under any title derived from mortgagee, it gives them the right of possession as against the mortgagor.

"The mortgagor cannot disturb them until he pays the mortgage; then he can be restored to his estate.

"It is claimed that although no statute of limitations has barred the right to recover, still the common law presumption of payment, after the lapse of twenty years, has cut off the right of these parties to assert this mortgage at this date. It is true the common law, after the lapse of twenty years, presumes payment of a debt under seal, but this is a presumption which may be rebutted.

"It may be proven as a matter of fact that the debt is not paid, the party asserting the debt having the affirmative, and, if that be proved, he may still recover. He is not confined to proving actual non-payment, but he may prove it by circumstances. He may show such circumstances as to warrant a jury in finding that he has not been paid.

"If this mortgage had been paid before any of these parties asserted any right under it, before 1861, if it was not a valid and subsisting mortgage at that time, I don't think the mortgagee would have any right to enter.

" The plaintiff claims it was presumptively paid. How does the evidence bear upon that ?

" The foreclosure suit was properly received for the purpose of establishing an assertion or claim on the part of the mortgagee as against the mortgagor's estate after his death, from which you might infer that the mortgage had not been paid up to that time. At his death, as the evidence shows, the mortgagor left four or five children, very young, who remained for a short time in St. Louis, and then went with their mother to New York.

" Their mother soon afterwards died, and, after living for a short time with their grand-parents, they were scattered (on their death) to different sections of the country. Three of the children died before majority, or about the time they arrived at majority, leaving surviving of that family but one, the witness in this case, who married, in 1840, an officer in the United States navy, and remained abroad and located at different points from that time up to the time of her husband's death in 1871. There is no evidence that any of the family have ever paid any attention to or looked after this land at all. They have been absent from the State during all this long period. Now, it is for you to say whether, upon these circumstances, you are warranted in presuming that the mortgage had not been paid.

" If, upon these facts, you are satisfied that the mortgage had not been paid, the case will be relieved of that question, and the defendant would be entitled to recover upon the second branch, if you find that the party was in possession under this Cabanne mortgage in the manner I have stated.

" The question as to the payment after they had gone into

possession, is immaterial in this case, for there is no pretence that the surviving heir has ever done anything.

"The payment rests entirely upon presumption arising from lapse of time, and are there any circumstances given in evidence to rebut that presumption? If the presumption is satifactorily rebutted, in your judgment, then, as I charged you before, the defendant, being in possession under the mortgage, and claiming under it, whether he owns the land or not, if he is in by license or authority of the mortgagee or persons representing the mortgagee, the defendant is entitled to a verdict."

Be it further remembered that the plaintiff excepted to that part of the charge which stated to the jury that the decree in the Pike county Circuit court, and the sale under it, extinguished the right of the heirs at law of William M. O'Hara.

And also to that part of the charge which held the execution of a deed by a part of the heirs at law of John P. Cabanne, was equivalent to an execution by all, and constituted a valid defence for the defendant to all of the land, the same as if executed by all.

And also to that part of the charge which held that the legal title of the land was vested in the mortgagee, Cabanne, and that the land being vacant and unoccupied, the mortgagee was in the constructive possession of the land, or that his heirs were, or that the heirs had a right to possession.

And also to that part of the charge which informed the jury that the purchase by the defendants, after they were in possession under another chain of title, as disclosed by the

evidence of Nettleton, constituted a possession under the mortgage.

Also to that part of the charge which undertook to recapitulate the evidence to rebut the presumption of payment arising from the lapse of time, and particularly to that part which held that the jury could consider the proceedings in Pike county, whether effectual to divest the title of O'Hara's heirs or not.

And the plaintiff also excepted to the charge, because the court omitted and refused, although requested so to do, to charge the jury that there was a presumption that the debts secured by the mortgages were paid in due course of administration of the estate of O'Hara in the State of Missouri. (Rec. 40–43.)

Upon this record the following propositions are presented to this court for review and decision:

First. The certified copy of the deed, dated Feb. 20, 1823, purporting to be executed by Henry Starr, Commissioner, to John P. Cabanne, was not proved so as to be read in evidence.

Second. The court below erred in instructing the jury that the decree of the Pike Circuit court, and the sale under it, extinguished the rights of the defendants therein and the heirs at law of William M. O'Hara.

Third. The court below erred in refusing to instruct the jury that there was a presumption that the mortgage of O'Hara to Cabanne, dated September, 1820, was paid before the year 1861, and in submitting the proceedings in the Pike Circuit court to the jury, as proper evidence to be considered in determining the question of the payment of the mortgage.

Fourth. The court below erred in instructing the jury that the mortgagee and his heirs were in the constructive possession of the lands, while they were vacant and unoccupied.

Fifth. The court below erred in instructing the jury that if the defendants held possession under a deed executed by only a part of the heirs of the mortgagee, it constituted a possession of the whole of the land, and was a good defence against the recovery of all of the land.

Sixth. The court below erred in instructing the jury that the legal title to the land was in the mortgagee.

II.

ASSIGNMENT OF ERRORS.

The plaintiff in error assigns the following errors in the proceedings of the court below:

First. The Circuit court erred in allowing the certified copy of the deed, dated February 20, 1823, purporting to be executed by Henry Starr, commissioner, to John P. Cabanne, to be read in evidence.

Second. The Circuit court erred in the following part of the charge to the jury, to wit: "I therefore decide that the decree in the Pike county Circuit court, given in evidence, and the sale under it, extinguished the right of the defendants therein, the heirs at law of William M. O'Hara, under whom the plaintiff in this case claims."

Third. The Circuit court erred in refusing to charge the jury as requested by the plaintiff, that upon the undisputed facts the law would presume the mortgage of O'Hara to Cabanne, dated September, 1820, to have been satisfied and paid before the year 1861; and also in instructing the jury that "the foreclosure suit was properly received for the purpose of establishing an assertion or claim on the part of the mortgagee, as against the mortgagor's estate after his death, from which you [the jury] might infer that the mortgage had not been paid up to that time."

Fourth. The Circuit court erred in instructing the jury that the deed made by a *part* of the heirs of Cabanne, the

mortgagee, and a possession under it, were equivalent to a deed executed by *all* of such heirs, and possession thereunder, particularly in the following portions of the charge, to wit: "I suppose if any portion of them [the heirs] transferred their interest in these premises, or put a party in possession under them, or gave a license for any person to occupy those premises under them as mortgagees, such persons so occupying and in possession, would have the right to assert the rights of the mortgagee." "So I charge you, as a matter of law, that if you find that the heirs at law, *or a part of them*, executed this conveyance to these parties, it operated at least as a license, and if you find the defendants in possession under that, they have the right to maintain the possession as against the mortgagor."

Fifth. The Circuit court erred in charging the jury that the legal title to the land was vested in the mortgagee, Cabanne, and that the land being vacant and unoccupied, the mortgagee and heirs were in the constructive possession of the land, in the following language: "And in this case the property being vacant and presumptively in the possession of the mortgagee, who is regarded as having the legal title (as possession is presumed to follow the legal title), I think the heirs would have the right as against the mortgagor (perhaps not the administrator), to assert the possession and transfer it by conveyance."

III.

BRIEF OF ARGUMENT.

Condensed statement of the case. Arg. 1–3.

QUESTIONS OF LAW.

I.

The decree of the Pike Circuit court, and the sale under it, did not extinguish the title of the heirs of O'Hara.

1. The certified copy of the deed from Starr, commissioner, under the decree, to Cabanne, was improperly admitted in evidence, because it was not acknowledged or proved according to law. (Rec. 16; Arg. 4–6; Laws 1819, 351, §§ 1, 19, 20, § 8.)

By law a deed could only be acknowledged in the State of Illinois in 1823, before one of the justices of the Supreme court, or a county commissioner, or a justice of the peace. This deed was not acknowledged before either of these officers, but purported to be acknowledged before the Circuit court in open session, and was certified by the clerk of that court.

If this deed is rejected, there was a failure to prove that the title of the heirs of O'Hara was extinguished by the decree and a sale under it, and the court erred in instructing the jury that such was the effect of the judicial proceedings. (Arg. 7–9.)

2. The decree of the Circuit court of Pike county was

void for the want of jurisdiction of the persons of the heirs of O'Hara. (Rec. 35–38, 25, 30; Arg. 9–15.)

O'Hara, the mortgagor, died intestate in July, 1821, leaving Susan O'Hara his widow, and four children, Susan, Charles, James J., William and Helen, and the widow died in the spring of 1822. (Rec. 6.)

Cabanne, the mortgagee, filed his bill April 23, 1822, the first day of the term of the Pike Circuit court, against Susan O'Hara, the widow, and others, the children and heirs of William M. O'Hara, but omitted to make such heirs parties by name. (Rec. 35, 38, 23.)

No subpœna or other process was ever issued, but the same day the bill was filed, the court made an order finding the defendants were non-residents, and ordered them to file answers by the first of the next October term, or the bill would be taken for confessed, and further ordered that *a copy of said order* be published three weeks successively in the Edwardsville Spectator. (Rec. 11, 25, 30; Arg. 9, 10, 11.)

At the October term a decree was entered in which it was recited that it appeared to the court that the *order* made at the last term for the appearance of the defendants, had been published three weeks successively in the Edwardsville Spectator, *as required by said order*. (Rec. 30, 31; Arg. 12, 13.

On these facts I have two propositions:

First. The record fails to show that the court had jurisdiction of the persons of Susan O'Hara, Charles O'Hara, Helen O'Hara, and James William O'Hara, who were vested with the equity of redemption.

Second. No presumption can be raised that the court

had jurisdiction, but the contrary is affirmatively shown. (Arg. 13; Laws 1819, 171.)

Where it appears affirmatively in a court of chancery that there was no service upon the defendant and no appearance, a decree disposing of the defendant's land is void.

Moore v. Stark, 1 Ohio, 369.
Morris v. Hogle, 37 Ill., 153.
Johnson v. Johnson, 30 Ill., 223.
Goudy v. Hall, *Ibid.* 109.
Hunt v. Wickliffe, 3 Peters, 215.
Whitney v. Porter, 23 Ill. 445.
Herdman v. Short, 18 Ill. 60.

The designation of the defendants by the name of "heirs at law of William M. O'Hara, deceased," was not authorized by statute; and the practice in courts of chancery, independent of a statute, did not give jurisdiction of the persons of such heirs. It was necessary to allege the names and serve a subpœna upon the persons, or to publish a notice to them in the manner ordered by the court. (Arg. 16, 17, *et seq.*)

Kirkham v. Justice, 17 Ill. 107.
Webster v. Reid, 11 How. 440.
Hickenbotham v. Blackleage, 54 Ill. 316.
Hollingsworth v. Barbour, 4 Peters. 467.
Story's Eq. Pl. § 44.
Farnham v. Hildreth, 32 Barb. 277.

It affirmatively appears from the record that there was no personal service, and that the publication of a notice was not in compliance with the statute. (Arg. 17–21.)

Where a record shows that a certain mode was adopted to obtain jurisdiction of the person, the court will not presume

that another and different mode was resorted to, in regard to which the record is silent. The statement of the record will be accepted as a verity, and as containing the whole truth on the subject.

When it appears from the record that the defendants were not within the jurisdiction of the court for the service of process on the person, and a statutory method of notice is adopted, the record must show, affirmatively, that the statute was complied with, and there is no presumption in favor of the jurisdiction, although the proceeding is in a court of general jurisdiction. (Arg. 21–27.)

Whitney v. Porter, 23 Ill, 447.
Galpin v. Page, 18 Wal. 364.
Haywood v. Collins, 60 Ill, 330.

3. The judicial proceedings were void for the want of jurisdiction of the subject matter.

It is admitted that the Circuit court of Pike county would have jurisdiction of a bill to foreclose a mortgage on lands, some or all of which were in that county. But this bill contained no description of any lands; the mortgages mentioned in the bill were not made exhibits; there is nothing in the decree to identify the lands; they may have been in another State, for aught the record shows. (Arg. 28–31.)

II.

The court erred in regard to the defense under the mortgage.

1. The defendants only held five-sevenths, undivided, of the land described in the declaration under the mortgage,

yet the court instructed the jury that this was a defense as to the entire tract. (Arg. 31–35.)

2. There was a presumption that the debt secured by the mortgage had been paid, and the title of the mortgagee ended. (Arg. 35–37.)

3. The court erred in deciding that the legal title was in the mortgagee. (Arg. 37.)

IV.

ARGUMENT.

May it please your Honors:

The plaintiff in error commenced an action of ejectment, against defendants in error, to recover the S. E. ¼ of Sec. 19, T. 13, N., R. 3, west of 4th P. M., in Mercer county, Illinois. The judgment in the court below was against the plaintiff, and he brings the case to this court for review.

On the trial, the plaintiff proved a title in fee in William M. O'Hara, derived by several mesne conveyances from the United States, the date of the deed to him being September 12, 1820. He then proved that William M. O'Hara died in Missouri in 1821 intestate, leaving Susan O'Hara, his widow, and four children; that the widow and three of the children died, so that Helen O'Hara, one of them, inherited the entire property. It was also proved that Helen O'Hara married Abram D. Harrell, September 23, 1840, who was a commander in the United States navy, and who died September 16, 1871. The plaintiff then proved a deed, dated May 2, 1868, executed by Abram D. Harrell and Helen O'Hara Harrell, to himself. It will be admitted that this evidence showed a title in the plaintiff in fee, which entitled him to recover in the absence of any other evidence. The defendant, however, undertook to prove a better title, derived from William M. O'Hara to him. They read in evidence a certified copy of a mortgage, dated September, 1820, by William M. O'Hara and Susan O'Hara,

his wife, to John P. Cabanne (all the parties being residents of St. Louis, Mo.), conveying fifty quarter sections of land in Madison county, Illinois, between the Illinois and Mississippi rivers, among which was the tract of land in controversy in this suit, with a condition of defeasance that if William M. O'Hara and Thomas Collett should pay to John P. Cabanne $5,093.33, agreeably to the terms of three promissory notes, executed by the said O'Hara and Collett to the said Cabanne, each for the sum of $1,697.78, one payable in seven months, one in ten and the other in twelve months after date, then the deed should be void. This mortgage was recorded, in Pike county, February 21, 1821.

The defendants then read in evidence judicial proceedings in the Pike county Circuit court in 1822 and 1823, by which the mortgage was foreclosed and the land sold by a commissioner under a decree; and a deed by the commissioner to John P. Cabanne, the mortgagee. They then claimed to have established title in Cabanne in two ways. First, by the original mortgage, and, second, by the deed of the commissioner under the decree.

The defendants then proved that Cabanne died intestate in 1842, leaving children and grandchildren as his heirs at law. A certified copy of the deed, dated April 1, 1861, by five-sevenths of the heirs of Cabanne to Booth Nettleton, conveying the tracts of land in controversy, with a large number of other tracts, for a consideration of $400, was then read in evidence. A deed, dated May 1, 1861, by Nettleton to one of the defendants, Ditto, conveying the east half of the land in controversy, and a contract by Nettleton to the other defendant, Dunn, dated November 6, 1861, agreeing to sell the west

half of the land in controversy, and a quit claim deed, dated May 26, 1865, by Nettleton to Dunn were read in evidence.

The defendants then read in evidence, as color of title, a deed, dated June 12, 1857, from George F. Harding and Joseph Matthews, purporting to convey the land in controversy to defendants.

It was also admitted that the land was vacant and unoccupied prior to 1857, and that defendants had been in the actual possession of the land, since 1857, under color of title.

It was proved also that neither O'Hara, his wife, or their children have resided in Illinois, and that Susan O'Hara, the widow, died in the spring of 1822, or early in the winter of 1823.

The plaintiff claims that the judicial proceedings of the Pike Circuit court and the commissioner's deed, were insufficient to foreclose the mortgage, or pass the title from the heirs of the mortgagor. The court below decided otherwise.

The plaintiff claims that even if the mortgage was not foreclosed by the judicial proceedings, the defendants did not hold a title under the mortgagee so as to defeat the plaintiff from recovering the land, or at least some part of it. The court below instructed the jury that the facts proven constituted a complete defence to the action.

From this statement it will be seen that the only questions of law presented for the decision of the court below and for review here, arise in regard to the defendants title.

Questions of Law.

1.

The decree of the Pike Circuit court, and the sale under it, did not extinguish the right of the heirs of O'Hara.

1. The certified copy of the deed from Starr, commissioner, to Cabanne, was improperly admitted as evidence.

There is no evidence whatever in the transcript of the record from the Pike Circuit court that the defendants failed to pay the amount found due by the decree, or that there was a sale of the land in controversy, or that it had been conveyed by the commissioner. The only evidence produced was a certified copy of a deed from the office of the recorder of deeds in Pike county, purporting to be executed by Henry Starr, a commissioner, to make sale of the lands under the decree to John P. Cabanne as a purchaser at such sale.

This deed was not acknowledged or proved according to law so as to be read in evidence. The proof relied upon consisted of the following certificate appended to the deed:

"State of Illinois, Pike County, }
Circuit Court, April Term, 1823. }

"Be it remembered that at this present term Henry Starr acknowledged in open court that, as commissioner, he had executed the within deed for the purpose therein expressed, and thereupon the court allowed and approved of said deed, and ordered the acknowledgment to be certified by the clerk, which is accordingly hereby done.

"Witness, James Whitney, Clerk of said court. This first day of May, A. D., 1823.

J. WHITNEY, Clerk."

The State of Illinois was admitted into the Union in 1818, and on the 30th of March, 1819, at the first session of its State legislature, an act was passed, which repealed all the Territorial Laws, except those fixing the boundaries of counties and locating seats of justice. (Laws of 1819, 351, § 1.)

On the 19th of February, 1819, an act was passed, the eighth section of which is as follows, to wit: "And be it further enacted, All deeds and conveyances which shall be made and executed of, or conveying any lands, tenements or hereditaments, within this State, or whereby the same may in any way be affected in law or equity, if such deeds and conveyances shall be made in this State, shall be acknowledged by one of the grantors, or proved by one or more of the subscribing witnesses to such deed or conveyance, *before one of the justices of the Supreme court, or before some county commissioner of the county where the deed or conveyance was executed, or before some justice of the peace of such county.* But if such deed or conveyance be executed without this State, then the same shall be acknowledged by the grantor, or proved by one of the subscribing witnesses, before some judge of a superior court of the State, mayor or other chief magistrate of the city, or before the clerk of the county, or other, court of the county where such deeds or conveyances shall be made and executed, and certified under the common or public seal of such city or county. And all such deeds and conveyances, whether executed within or without the State, shall be recorded in the recorder's office of the county where such lands, tenements or hereditaments are lying, and being, within twelve months after the execution of such deeds and conveyances; and every such deed or conveyance that shall at any time after the publication hereof be made and executed, and

which shall not be proved and recorded as aforesaid, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such deed or conveyance be recorded, as aforesaid, before the proving and recording of the deed of conveyance, under which such subsequent purchaser or mortgagee shall claim." (Laws 1819, 19–20, § 8.)

This was the only statutory mode of acknowledging deeds, so as to dispense with common law proof of execution in existence, when the deed from Starr to Cabanne was made. By the statute the acknowledgement could only be made before a supreme judge, a county commissioner, or justice of the peace. This deed was not acknowledged before either of these officers; but the certificate shows that the grantor appeared before a circuit court in session and acknowledged to that court he had executed the deed, and the court ordered the acknowledgment to be certified by the clerk, which was done by the signature of the clerk without the seal of the court. There was no attempt to comply with the statute, and there was no proof that the person who signed the certificate was clerk, and the certificate was not attested by a seal of the court.

The defendants in error will scarcely claim that the deed was proved according to the statute. Yet the court below allowed as evidence a certified copy of the deed, not acknowledged so as to entitle the original to be read in evidence against the objection of the plaintiff, and then instructed the jury that the sale under the decree was sufficient to extinguish the title of the heirs of O'Hara, under whom the plaintiff claimed. It will be remembered that there is no evidence that there had been a sale, or a deed, under the decree, or that the contingency

happened so as to authorize a sale, except by the recitals of this deed. Therefore, if the copy of such deed is rejected, there is no evidence in the record that the title of the heirs of O'Hara had been extinguished by any sale under any decree.

The court below, therefore, erred in allowing the copy of the deed to be read to the jury, and in giving effect to the sale and deed as a part of the judicial proceedings, by the statement to the jury that the title of the heirs of the deceased mortgagor was thereby extinguished.

If this deed is rejected, then the defendants failed to prove a foreclosure of the mortgage and a conveyance of the title free from the right of the heirs to redeem. If this deed is eliminated from the case, the defendants failed to defeat the plaintiff's title in one of the ways attempted.

But it may be claimed that the rejection of this deed is immaterial, and that the decree alone, without a sale or deed under it, barred the equity of redemption and declared the title absolute in the mortgagee.

An examination shows that the court did not attempt to make a *strict* foreclosure. The bill prayed for an account and an order for payment, and in case of failure to pay, for a sale and payment of the sum due out of the purchase money. (Rec. 37.) The relief granted is in accordance with the prayer of the bill in this respect. The decree finds that there is due to the complainant $5,462.20, by virtue of the three promissory notes and mortgage mentioned in the bill, and orders the defendants to pay that sum by the 20th day of November next thereafter, with costs; and on failure to pay the said sum by that day, then, and in that case, it is further ordered

that the defendants be barred and foreclosed from all equity of redemption in the mortgaged premises, and that the several quarter sections of land, sixty-six in number, be separately sold. It was further ordered that Henry Starr be a commissioner to make sale, and that he execute a deed to the purchaser, and from the proceeds he pay the amount due the complainant, and deposit the residue in court; but in case the complainant was the highest bidder, he should take his receipt for the amount of his bids and file it with the clerk. (Rec. 30.)

It will be seen that this decree was interlocutory and did not pretend to declare the title in the mortgagee absolute. Like the mortgage, it fixed a time for the payment of the sum due and only ordered a foreclosure by sale, in case the payment was not made. The defendants in such a case are not foreclosed until a sale is actually made; they have the right to pay the sum due at any time before a sale, and relieve the property from the incumbrance. The object of fixing a day for payment is to give a time for payment before there is even a right to sell. The foreclosure is incomplete until a sale is made, a deed executed and delivered, and the sale confirmed by a decree of the court. The only effect of such a decree is to determine the amount due to the mortgagee and authorize a sale if the sum is not paid. The modes of foreclosure by entry of the mortgagee or by a decree declaring the title absolute, are entirely different, and in Illinois at the time this decree was entered, neither of them was allowed by law.

If the deed be rejected, then there is no evidence whatever that the money found due by the decree, was not paid, or that the contingency ever existed which authorized a sale, or that a sale or deed was made. The presumption in the ab-

sence of all proof that a sale was not made, is that the defendants complied with the interlocutory decree by paying the money. A presumption of payment arises by law from the lapse of time precisely the same as in case of a mortgage. I will not discuss this proposition now, but reserve what I have to say until the question of payment of the mortgage is reached, because the facts and law are substantially the same upon both points.

The only present object is to establish the fact that the interlocutory decree did not foreclose the mortgage and vest an absolute title in the mortgagee.

From these premises the conclusion is, that the effort of the defendants to prove title out of William M. O'Hara by judicial proceedings of foreclosure of the mortgage, was a failure, that the court erred in admitting the deed of Starr, special commissioner, to Cabanne, and erred in instructing the jury that the decree and sale under it extinguished the title of the heirs of O'Hara. If we are correct in these conclusions the judgment must be reversed.

2. The decree of the Circuit court of Pike county was void for the want of jurisdiction of the persons of the heirs of O'Hara.

It appears from the evidence that the mortgagor, William M. O'Hara, died in the summer of 1821, intestate, in St. Louis, Missouri, leaving a widow, Susan O'Hara, and four children, Susan, Charles, Helen and James William; and that the widow died in the spring of 1822. (Rec. 6.)

The suit to foreclose was commenced by the filing of the bill on the 23d day of April, 1822, which was the first day of a term of court. (Rec. 38, 23.) At that time, therefore, the

children of O'Hara, the mortgagor, who were his heirs at law, Susan, Charles and James William, were necessary parties. If the widow, Susan, was living, she was also a necessary party. The title was vested in the heirs, subject to the widow's dower and the mortgage. The object of the bill was to foreclose their equity of redemption.

The bill alleges that William M. O'Hara died about July 1st, 1821, at the post of Arkansas, and that the widow and children, heirs at law, resided, at the filing of the bill, in the State of Illinois, and prays that Susan O'Hara, widow of William M. O'Hara, and the children and heirs of William M. O'Hara, be made parties defendant, and a subpœna issue for them, *but the names of such children and heirs are not given in the bill.* (Rec. 37, 38.)

No subpœna or other process was issued. This appears not only from the fact that none appears in the record, but because on the first day of the April term, 1822, the same day the bill was filed, an order was made which recites that it appeared to the court that the defendants were not inhabitants of the State, and they were ordered to file their answer to the bill on or before the first day of the next October term, or that the bill would be taken for confessed against them, and it was further ordered that a copy of the order be published three weeks successively in the Edwardsville Spectator. (Rec. 11, 25.)

It is certain that no writ was issued, also, because the statute then in force provided that a subpœna should not be issued until the bill was filed, and the order for publication of notice was made on the same day it was filed. This fact further appears from the decree rendered at the October term, 1822, which recites, as the foundation for jurisdiction of the

person, that the order of the preceding term had been published, as required by said order. (Rec. 30.)

By reference to the order for publication it will be seen that it was entered in cases entitled "*Robert Simpson, complainant, v. Susan O'Hara and others, defendants,*" and "*John P. Cabanne, complainant, v. Same, defendants,*" and that the defendants are not otherwise described. It does not appear from this order that the "others" besides Susan O'Hara, were Susan O'Hara, Charles O'Hara, Helen and James William O'Hara, or even the children and heirs of William M. O'Hara.

The order did not direct the clerk to publish a notice, *but to publish a copy of the order itself.* If the clerk complied with the order, the publication was as follows, to-wit:

"JOHN P. CABANNE, *Complainant,*
v.
"SUSAN O'HARA, and others, *Defendants.* } *In Chancery.*

"It appearing to the court that the defendants in this cause are not inhabitants of this State, and they not having answered the complainant's bill; it is ordered by the court that they file their answers to said bill with the clerk of this court on or before the first day of the next October term o said court, or that said bill will be taken for confessed against them. And it is further ordered that a copy of this order be published three weeks successively in the Edwardsville Spectator."

It may be presumed that a certificate was appended to the order by the clerk, showing that it was a true copy of the order entered by the Circuit court of Pike county, Illinois.

It is not possible to presume that the clerk inserted at

the head of the order, or in his certificate, the names of Susan O'Hara, Charles O'Hara, Helen and James William O'Hara, the heirs of William M. O'Hara, because the bill on file did not contain these names, so that he could not have any information in regard to their names. The only fair presumption is that he complied with the terms of the order and published it as recorded.

There was, therefore, no name whatever in the notice—for Susan O'Hara, the widow, must have been dead before it was published. It contained no information from which these heirs could learn the suit was against them or affected their rights. If by chance attention had been directed to the bill it would have appeared that they were not parties defendants.

At the October Term, 1822, which was the next after the order of publication was made and at which an answer was required to be filed, a decree was entered.

The title of the case in which this decree was entered was "John P. Cabanne, Complainant, v. Susan O'Hara, and others, Defendants, Bill in Chancery." It will be remembered that Susan O'Hara, the widow, was dead at this time, so that there was no living person named as a defendant. The title of the case gives the only names of parties to be found in the decree.

The only recital of process or notice is the following, to-wit: "This day came the complainant by his counsel, and it appearing to the court that the order made at the last term for the appearance of the defendants in this cause has been published three weeks successively in the Edwardsville Spectator, as required by said order, and the defendants not having

entered their appearance herein, nor answered the bill of complaint, on motion of the complainant's counsel it is ordered by the court that the said bill be taken for confessed against them." (Rec. 30, 31.)

On these facts I base two propositions. *First.* The record fails to show that the court had jurisdiction of the persons of Susan O'Hara, Charles O'Hara Helen and James William O'Hara, the heirs at law of William M. O'Hara, who were vested with the equity of redemption. *Second.* No presumption can be raised that the court had jurisdiction, but the contrary is affirmatively shown.

The second section of the act of March 22, 1819, in force at the time these foreclosure proceedings were had, is as follows:

"*Be it further enacted*, That in all suits in chancery in "the said Supreme and Circuit courts, the rules and methods "which regulate the High Court of Chancery in England "shall, as far as the said courts may deem the same applicable, "be observed," etc.

Section 6 is as follows:

"*Be it further enacted*, That any subpœna, process of "sequestration, writ of execution, or other writ or process in "chancery, shall be issued by the clerk at the instance of the "party applying for the same.

"Section 7. *Be it further enacted*, That in all cases in "chancery the rules to plead, answer, reply, rejoin, or other "proceedings, shall be given in open court, and be entered in "a book to be kept for that purpose, for the information of all "parties, attorneys or counselors, therein concerned.

"Section 8. *Be it further enacted*, That no subpœna

"in chancery shall issue until the bill be filed with the clerk, "whose duty it shall be to copy the same, and to deliver a copy "to the person applying for the subpœna, which copy shall be "delivered to the defendant, if within the State, by the officer or "the person serving the subpœna, which service and delivery "shall be endorsed on the back thereof; and if there be more than "one defendant, the said copy shall be delivered to the one first "named in the subpœna, if he be a resident within this State; "if not, the next one named that is a resident."

"Section 9. *Be it further enacted*, That if any defend- "ant in chancery (if but one) or defendants (if more than one) "reside out of the State, or cannot be found to be served with "process of subpœna, or abscond to avoid being served there- "with, *public notice shall be given to the defendant or defend- "ants, signed by the clerk, in any newspaper printed in this "State or any adjoining State or Territory, as the court may "direct, that unless he, she or they appear and file his, her or "their answer by a day given them or him, the bill should be "taken pro confesso.* And when a bill is amended, a copy of "the amendatory bill shall in like manner be delivered to the "defendant or defendants." (Laws 1819, 171.)

All Territorial laws were repealed by an act, approved March 30, 1819, p. 351, so that the above act regulating chancery practice was the only one in force at the time these foreclosure proceedings were commenced, *i. e.*, April A. D. 1822, except as modified by the act of January 5, 1821, section 3, which is as follows:

"*Be it further enacted, etc.*, That actions may be "brought and process issued at law or in chancery before the "filing the declaration or bill, and in no case hereafter shall

"it be necessary to send out the declaration or a copy of the "bill with the original writ or process: *Provided*, That unless "the declaration shall be filed in the clerk's office, together with "a copy of the instrument of writing or account upon which "the action may be founded, ten days before the return day "of the writ, the defendant shall not be required to answer, "but the cause shall stand continued until the next term of "the court, at the cost of the plaintiff, and in all such cases "new process shall be served on the defendant requiring his "attendance at such subsequent term, and the costs, accruing "on such continuances shall never be taxed against the de-"fendant or defendants, notwithstanding the suit may "eventually terminate in favor of such plaintiff. And when-"ever the declaration and instrument upon which the suit "may have been founded shall not be filed in the proper "clerk's office, ten days previous to said subsequent term, it "shall be the duty of the presiding judge of said court to "strike such cause from the docket and enter a judgment "against said plaintiff for all such costs as may have accrued: "*Provided*, That such striking from the docket shall not op-"erate otherwise than as a non-suit: *provided*, also, that in "suits in chancery the bill shall be filed by the first day of "the next term after process shall have issued."

Under the English chancery practice, which the second section of the act of March 22, 1819, adopts, and which must govern in this case, parties to suits in chancery should be described by their proper names, or the names by which they are known. The recitals, "Susan O'Hara and others, de-"fendants," and "Susan O'Hara, widow, and others, children "and heirs-at-law of William M. O'Hara, deceased, defend-"ants," which is the only way the defendants are designated

both in the bill and in the decree, are not sufficient description to give the court jurisdiction of the persons attempted to be made parties.

Under the provisions, of section 41, Revised Statutes 1845, persons whose names are unknown may be made parties by description of persons unknown or unknown heirs or devisees, etc. Prior to the enactment of that statute, there was no law in Illinois by which parties whose names were unknown could be made defendants in a chancery proceeding by any description that could give the court jurisdiction of their persons.

Where it appears affirmatively in a court of chancery that there was no service upon the defendant and no appearance, a decree disposing of the defendant's land is void.

Moore v. Stark, 1 Ohio, 369.
Morris v. Hagle, 37 Ills. 153.
Johnson v. Johnson, 30 Ills. 223.
Goudy v. Hall, Ibid. 109.
Hunt v. Wickliffe, 2 Peters, 215.
Whitney v. Porter, 23 Ills. 445.
Herdman v. Short, 18 Ills. 60.

The designation of the defendants by the name of the "heirs-at-law of William M. O'Hara, deceased," was not authorized by statute, and the practice in courts of chancery, independent of a statute, did not give jurisdiction of the persons of such heirs. It was necessary to allege the names and to serve a subpœna upon them, or to publish a notice to them in the manner ordered by the court.

Kirkham v. Justice, 17 Ills. 107.
Hickenbotham v. Blacklege, 54 Ib. 316.
Hollingworth v. Barbour, 4 Peters, 467.

Story's Eq. Pl. § 44.
Webster v. Reid, 11 How. 440.
Farnham v. Hildreth, 32 Barbour, 277.

In the case of *Webster v. Reid*, 11 How. 436, a statute authorized a suit to be commenced against "the owners of half breed lands lying in Lee county, Iowa." A suit was instituted according to this statute, a judgment rendered, and land sold. In action of ejectment, where the plaintiff claimed title under such judgment and sale, this court held the judgment void, because the suit was not commenced against the defendants by name, and process served upon them. It is said in the opinion: "These suits were not a proceeding *in rem* against the land, but were *in personam* against the owners of it. Whether they all resided within the Territory or not does not appear, nor is it a matter of any importance. No person is required to answer in a suit on whom process has not been served, or when property has not been attached. In this case there was no personal notice nor an attachment or other proceedings against the land until after judgments. The judgments, therefore, are nullities and did not authorize the execution on which the land was sold."

In the case at bar the proceeding was not *in rem* against the land to foreclose the mortgage, but a bill in chancery against the owners of the equity of redemption to foreclose it. An account was sought and a decree against the defendants for payment as a condition precedent to a right to resort to the land.

Assuming that it was necessary that Susan O'Hara, Charles O'Hara, Helen and James William O'Hara were necessary parties, and that the law required them to be made such by

name, and that a designation of them by the words, "children and heirs at law of William M. O'Hara," was not enough to give the court jurisdiction of their persons, the next question is, can the court presume that these persons were made parties and brought within the jurisdiction of the court by the service of a subpœna, or by the publication of a notice to them, as required by the statute.

It is a settled principle of law that no presumption can be indulged against the express recitals of the record. It is only where the record is silent, and the action of the court is such that a fact not appearing must be presumed, to justify such action, that a presumption is allowed to sustain the judicial proceedings.

The force of the rule that the judgments of courts of general jurisdiction will be sustained upon the presumption that every fact necessary to justify the court in assuming jurisdiction, is admitted to its fullest extent. But this rule only applies where the record is *silent* as to such facts. When the court makes a declaration in regard to any one of them, such finding is to be received as a verity, and no fact can be presumed which is inconsistent with the record.

The record in this case is complete except that there is a want of a copy of the publication in the newspaper. It is admitted that the court will presume that this publication was in conformity to law, unless there are other portions of the record showing that it was not. If the record preserved and offered in evidence proves that the publication was contrary to law, or not in accordance with it, there is no room left for presumption.

It affirmatively appears from the bill itself that Susan O'Hara, Charles O'Hara, Helen and James William O'Hara

were not named as defendants, otherwise than as they might be included in the description of children and heirs at law of William M. O'Hara. It affirmatively appears that no subpœna was issued or served, for on the day the bill was filed the court found the defendants were not inhabitants of the State, and ordered the publication of a notice which was only permitted by the statute in cases where service of a writ could not be had, and when the decree was rendered it was based, as to jurisdiction of the persons of the defendants, on such a notice. It affirmatively appears that there was no appearance of the defendants, for the decree declares that they had not appeared or filed an answer, and the bill was taken as confessed. It affirmatively appears that a copy of the order of April 23, 1822, was published as required by said order, for the decree rendered October 7, 1822, so finds.

What notice, then, was published?

The statute provided that "public notice shall be given to the defendant or defendants, signed by the clerk, in any newspaper printed in this State or any adjoining State or Territory as the court may direct, that unless he, she, or they appear and file his, her or their answer by a day given them or him by the court, the bill shall be taken *pro confesso.*"

Laws 1819, 171, §9.

The record shows the following orders:

"DANIEL C. BOSS, *Complainant*,
v.
"JOHN ADAMS, and ELIZABETH, his wife, *Defendants.* } *In Chancery.*

"It appearing to the court that the defendants in this cause are not inhabitants of this State, and that they have not answered the complainant's bill, it is ordered by the court that they file their answers to said bill with the clerk of this court

on or before the first day of the next October term of said ———, or that said bill will be taken for confessed against them; and it is further ordered that a copy of this order be published three weeks successively in the Edwardsville Spectator."

"ROBERT SIMPSON, *Complainant*,
v.
"SUSAN O'HARA, and others, *Defendants*, } *In Chancery.*

"JOHN P. CABANNE, *Complainant*,
v.
"Same, *Defendants*. } *In Chancery.*

"Ordered that the same notice be given in the two last cases as in the one immediately foregoing.

It is not to be supposed that the clerk merely published the exact order entered in the last *two* cases, nor that such a publication would be a compliance with the direction of the court. He might, however, have published the record so far as it related to the *three* cases, which would have been a literal compliance with the order, as the last entry refers to the preceding one. It may be guessed that he framed an order for the last case like the one in the first. But in every event the direction was not to publish a notice to the defendants, *but a copy of the order*. When the decree was rendered the next October, the court found that the clerk had published "*the* ORDER *made at the last term as required by said order.*"

Therefore the record shows affirmatively that a copy of the order of April 23, 1822, was the publication made.

Whatever the clerk did, it is very certain that he did not give a notice to Susan O'Hara, Charles O'Hara, Helen O'Hara and James William O'Hara, the heirs of William M. O'Hara,

because their names were not in and formed no part of the order, a copy of which was found to have been published.

It is also very certain that he did not give any such notice, because the defendants, shown by the bill, were Susan O'Hara, widow, and others, the children and heirs at law of William M. O'Hara, and the clerk had no information whatever in his office which furnished such names. If the complainant commenced his suit against certain persons named under a general description of Heirs, it would be a violent presumption to suppose that a clerk departed from it.

All other parts of the record confirm the assertion that these heirs were never made defendants by name, for they nowhere appear. Even after decree for sale, the commissioner gave a notice of sale in which he said, "Pursuant to a decree in chancery of the Circuit court of Pike county, made at the October term, 1822, in a cause wherein John P. Cabanne is complainant and Susan O'Hara, widow, and others, the children and heirs at law of William M. O'Hara, deceased, are defendants." (Rec. 39.)

The principle of law applicable is, that when a record shows affirmatively that a certain mode was adopted to obtain jurisdiction of the person, the court will not presume that another and different mode was resorted to in regard to which the record is silent. The statement of the record will be accepted as a verity, and as containing the whole truth on that point.

Another principle of law applicable is that, when it appears from the record that the defendants were not within the jurisdiction of the court for the service of process on the person, and a statutory method of notice is adopted, the record

must show affirmatively that the statute was complied with, and there is no presumption in favor of the jurisdiction, although the proceeding is in a court of general jurisdiction.

A case precisely like the one at bar as to the principle under discussion, is to be found in 23 Ills., 447. In that case the judgment was rendered by this same Circuit court of Pike county, at the same April term, 1822. It appeared in that case, as in this, that a fire had destroyed a part of the papers, so that the judgment was all that remained. The judgment recited that a notice had been served on the infant heirs of the decedent, while the statute required the service upon the guardians or persons who had control of them. Here it might have been said there was a presumption that a notice was also served on the guardians, but the court held the recital showed affirmatively a want of jurisdiction of the persons. The court say: "The question presented by this record is, did the Circuit court of Pike county have jurisdiction of the persons of the minor heirs of Wadsworth, so as to pass a decree against them for the sale of their land, to pay their ancestor's debts, as by the order of that court, of April term, 1822, it attempted to do?

"That court being a court of general and unlimited jurisdiction, every reasonable intendment is to be made to sustain its acts, judgments, decrees and orders, when it is shown jurisdiction attached in the particular case. This is a well settled doctrine of the books, and of all the courts.

"By force of it, considering the lapse of time since the order (more than thirty years), the destruction of the records and files of the court by fire, the death of the principal actors in these proceedings, we should be induced to presume much to sustain this order of sale. But when we see the final order

of the court decreeing a sale of the land, in which it is recited that notice of the application was only served upon the infant heirs of the decedent, when the statute requires service upon their guardians or persons having control of them, and no guardians *ad litem* appointed for them by the court, we are constrained to say, the court had not obtained jurisdiction of the persons of the minors in the mode pointed out by the law."

Whitney v. Porter, 23 Ills., 447.

It is not necessary to refer to authorities on this point to any extent, because the rules of law have been definitely settled by this court in the case of *Galpin v. Page*, 18 Wal. 364.

Mr. Justice Field, who wrote the opinion, says: "But the presumptions, which the law implies in support of the judgments of superior courts of general jurisdiction, only arise with respect to jurisdictional facts, concerning which the record is silent. Presumptions are only indulged to supply the absence of evidence or averments respecting the facts presumed. They have no place for consideration when the evidence is disclosed or the averment is made. When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point; and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred. If, for example, it appears from the return of the officer or the proof of service contained in the record that the summons was served at a particular place, and there is no averment of any other service, it will be presumed that service was also made at another and different place; or if it appear in like manner that the service was made upon a person other than the defendant, it will not be pre-

sumed, in the silence of the record, that it was made upon the defendant also.

"Were not this so, it would never be possible to attack collaterally the judgment of a superior court, although a want of jurisdiction might be apparent upon its face; the answer to the attack would always be that, notwithstanding the evidence or the averment, the necessary facts to support the judgment are presumed.

"The presumptions indulged in support of the judgments of superior courts of general jurisdiction are also limited to jurisdiction over persons within their territorial limits, persons who can be reached by their process, and also over proceedings which are in accordance with the course of the common law.

"The tribunals of one State have no jurisdiction over the persons of other States, unless found within their territorial limits; they cannot extend their process into other States, and any attempt of the kind would be treated in every other forum as an act of usurpation, without any binding efficacy.

* * * * * * * * * *

"Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was, at the time of the alleged service, without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdition over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree. This is so obvious a principle, and its observance is so essential to the protection of parties without the territorial jurisdiction of a

court, that we should not have felt disposed to dwell upon it at any length had it not been impugned and denied by the Circuit court. It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity, wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.

"When, therefore, by legislation of a State, constructive service of process by publication is substituted in place of personal citation, and the court upon such service is authorized to proceed against the person of an absent party, not a citizen of the State, nor found within it, every principle of justice exacts a strict and literal compliance with the statutory provisions. And such has been the ruling, we believe, of the courts of every State in the Union. * * * *

"But it is said that the court exercises the same functions and the same power whether the service be made upon the defendant personally or by publication, and that, therefore, the same presumption of jurisdiction should attend the judgment of the court in the one case as in the other. This reasoning would abolish the distinction in the presumptions of law, when applied to the proceedings of a court of general jurisdiction, acting within the scope of its general powers, and when applied to its proceedings had under special statutory authority. And, indeed, it is contended that there is no substantial ground for any distinction in such cases. The distinction, nevertheless, has long been made by courts of the highest character, both in this country and in England, and

we had supposed that its existence was not open to discussion. 'However high the authority to whom a special statutory power is delegated,' says Mr. Justice Coleridge, of the Queen's Bench, 'we must take care that in the exercise of it the facts giving jurisdiction plainly appear, and that the terms of the statute are complied with. This rule applies equally to an order of the Lord Chancellor as to any order of Petty Sessions.'

"'A court of general jurisdiction,' says the Supreme court of New Hampshire, 'may have special and summary powers, wholly derived from statutes not exercised according to the course of the common law, and which do not belong to it as a court of general jurisdiction. In such cases its decisions must be regarded and treated like those of courts of limited and special jurisdiction. The jurisdiction in such cases, both as to subject matter of the judgment and as to the persons to be affected by it, must appear by the record; and everything will be presumed to be without the jurisdiction which does not distinctly appear to be within it.'

"The qualification here made that the special powers conferred are not exercised according to the course of the common law, is important. When the special powers conferred are brought into action, according to the course of that law, that is, in the usual form of common law and chancery proceedings, by regular process and personal service, where a personal judgment or decree is asked, or by seizure or attachment of the property where a judgment *in rem* is sought, the same presumption of jurisdiction will usually attend the judgments of the court, as in cases falling within its general powers. Such is the purport of the language and decision of this court in *Harvey v. Tyler*, 2 Wallace, 332. But where the special

powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record."

The Supreme court of Illinois, in the case of *Haywood v. Collins*, 60 Ill. 330, approves the same doctrines in a very exhaustive opinion by Mr. Justice Thornton. In that case there was a proceeding by attachment in the Circuit court, a superior court of general jurisdiction, where the statute authorized a personal service of the defendant if found, and if not, the publication of a notice. The record showed a return of "not found," and a notice, proper in form, was on the files, but the certificate did not state that the person who signed it was a printer or publisher of any newspaper, as required by the statute.

The court held the judgment void when it was offered in an action of ejectment, to support a title to land sold under it. It was held that no presumption could be indulged that the person who signed the certificate was a publisher, or that there was any proof before the court to that effect. It was also held that the facts to give the court jurisdiction of the person, must appear affirmatively on the record, because the proceeding was a statutory one, and not according to the course of the common law, although the court was a superior one, of general jurisdiction. Attention is called to this case and the authorities cited therein.

The conclusion is that the decree of the Pike Circuit

court was void for the want of jurisdiction of the persons of Susan O'Hara, Charles O'Hara, Helen O'Hara and James William O'Hara, because process was not served upon them, and they were not residents of the State and within reach of process, and the notice was not in conformity with the statute in this, that the notice was not directed to these persons, who were necessary defendants.

3. The judicial proceedings were void for the want of jurisdiction of the subject matter.

It is admitted that the Circuit court of Pike county would have jurisdiction of a bill in chancery to foreclose a mortgage on lands in that county. If the bill had set forth a mortgage conveying lands situated in Pike county, then the court would be moved to act, and where jurisdiction of the persons of the defendants was acquired, the proceedings could not be successfully assailed when presented collaterally. But the bill did not state any mortgage on lands within the jurisdiction of that county. It avers that William M. O'Hara was seiz d, or pretended to be seized, of certain lands thereinafter mentioned; and after stating an indebtedness alleges that William M. O'Hara and Susan, his wife, in order to secure the payment, executed two mortgages to the complainant, which were then in his custody and ready to be produced and shown to the court. There is no other reference to the two mortgages, nor are either of them made exhibits, or attached to the bill. It is impossible to ascertain from the bill the location or description of the lands mortgaged. (Rec. 35–38.) There is no better information to be obtained in any order or decree entered in the case. There is nothing to be found in the order entered at the April term, 1822. In the decree of October 7, 1822, the court orders that the mortgaged

premises mentioned in the complainant's bill, being sixty-six quarter sections of land, be separately sold at public auction, but there is no other reference or description of the land in this decree. The entire record is silent as to the lands included in the mortgage, so we can not learn from any part of it that the lands were located in Pike county. (Rec. 30–31.)

The court below appreciated this difficulty, and directed the jury to determine from the evidence whether or not the mortgages offered in evidence were the same described in the record from Pike county; and the court made the decision of that question in the affirmative a condition precedent to the application of the charge, that the decree and sale under it extinguished the rights of the heirs of O'Hara.

I insist, however, that a record of judicial proceedings must show on its face, or by necessary intendment a subject matter within the jurisdiction of the court, and that it is not competent to show by parol such jurisdiction. Perhaps this will be conceded, and it will be claimed that the evidence referred to by the court, appeared on the record and in the copies of the mortgages from the office of the recorder of deeds. Still I insist that the question of the admission of a record in evidence, is one of law for the court and not one of fact for the jury. The court must decide whether or not the proceedings relate to the land in controversy, because if they do not they are irrelevant testimony and inadmissible.

It may be well to call attention to such facts as this record contains, on the question as to whether or not the bill and decree read in evidence, related to the land in controversy in this suit or the mortgage read in evidence.

The defendants on this point read another mortgage in

evidence, dated April 13, 1821, by Wm. M. O'Hara and Susan, his wife, to Cabanne, to secure the same notes mentioned in the other mortgage, and which conveyed sixteen quarter sections of land in the Military Bounty Tract of Illinois, describing them.

The two mortgages contained sixty-six quarter sections of land, the same number mentioned in the decree of October 7, 1822. Both of these mortgages were executed by William M. O'Hara and Susan his wife to John P. Cabanne, and the bill described two mortgages between these parties. The amount found to be due by the decree of October 7, 1822, was $5,462.20 upon three promissory notes; the two mortgages produced were to secure these promissory notes for the sum of $5,093.33, executed in September, 1820, due in seven, ten and twelve months, each for $1,697.78. With these facts, the evidence tending to show the mortgages mentioned in the judicial proceedings to be the same as those, copies of which were produced on the trial, ends.

On the other hand the bill states that the promissory notes were made by William M. O'Hara, while the two mortgages show the three notes secured thereby were signed by Wm. M. O'Hara and Thomas Collett. The bill avers that the mortgages mentioned therein were upon condition that William M. O'Hara should pay the sums of money secured, while those produced were upon the condition that William M. O'Hara and Thomas Collett or either of them should pay the three promissory notes. The bill describes mortgages containing a power of sale in case of default, while those produced have none whatever. It was shown by the deed from Abbott to O'Hara, read in evidence, that he was the owner of forty-four of the sixty-six quarter-sections described in these two

mortgages, but it is not shown that he had any title to the others. The bill gives no dates to the two mortgages mentioned therein, while of the two produced, one is dated on the —— day of September, 1820, and acknowledged October 3, 1820, and the other is dated April 13, 1821.

It would seem to be very hard to say from all these facts that the copies of the two mortgages produced were the same which were produced before the Circuit court of Pike county.

II.

The court erred in regard to the defence under the mortgage if it was not foreclosed.

1. The defendants only held an undivided five-sevenths under the mortgage, yet the court instructed the jury that this was a defence as to the entire tract.

For the purpose of discussing this branch of the case, it must be assumed, as it was in the court below, that the judicial proceedings were ineffectual to extinguish the title of the heirs of O'Hara, and that it had never been legally foreclosed.

In establishing this defence, the defendants read the copy of the mortgage of September, 1820, from O'Hara and wife to Cabanne. (Rec. 6.)

Next they proved that Cabanne died at St. Louis in July, 1842, leaving certain children and grand-children. (Rec. 18.)

Next they read a copy of a quit-claim deed, dated April 1, 1861, from five-sevenths of the heirs of Cabanne to Booth Netleton, by which the lands in controversy with others were conveyed for the consideration of $400.

The defendant next read a deed, dated May 1, 1861,

from Nettleton, conveying the east half of the quarter section to the defendant Ditto; and an agreement, dated November 6, 1861, from Nettleton to the defendant Dunn, for the west half, and a deed in pursuance of that agreement, dated May 26, 1865. (Rec., 19.)

It appeared from the evidence that the defendants had a deed from Harding & Mathews, who had no title, dated June 12, 1857, which was introduced as color of title; and that the defendants took actual possession under it, and were in such possession when they received the quit-claim deeds from Nettleton. (Rec., 20.)

The court instructed the jury that a conveyance by any portion of the heirs of the mortgagee to the defendants, and a possession under such a deed, would enable them to hold the possession of the entire tract of land against the plaintiff, who was the grantee of the heirs of the mortgagor, in this action of ejectment; and that such possession could not be disturbed without a payment of the mortgage. (Rec., 40-41.)

The plaintiff claims that this is not the law, and that he was entitled, in any event, to recover such undivided shares as were not vested in the defendants.

In considering this point it is to be remembered that the mortgage was dated in 1820, and was given to secure the payment of three promissory motes, due in five, seven and twelve months; that no claim was ever asserted under the mortgage by Cabanne during his life time, a period of over twenty years, save the abortive foreclosure; and that no attention was paid to the land by the heirs for twenty years more, when a conveyance by quit-claim was made by five-sevenths of the heirs to Nettleton for $400; that the defendants were then in actual posses-

sion of the land in controversy in this suit, claiming to be the owners under color of title derived from an adverse source; and that Nettleton then quit-claimed such title as he had to the defendants. It is to be further remembered that the notes secured by the mortgage were not transferred to anyone, and so far as the record shows, they were paid or remained in the mortgagor during his life, and passed to his administrators afterwards. It is to be further remembered that O'Hara died in Missouri, where he resided, in 1821—the same place Cabanne, the mortgagor resided. That was the place for administration of the estate, and the place where these notes ought to be presented, allowed and paid. If not paid, they had been barred by limitation laws for more than twenty-five years before the conveyances were made by the heirs of the mortgagor to Nettleton and by him to the defendants.

What then was transferred to the defendants? It was not the notes or any other evidences of indebtedness, if any existed, because they were vested in the administrator of the mortgagor or the holder of such indebtedness. When Cabanne died this indebtedness was either paid or barred, and nothing could have descended to his heirs save the legal title to the land, which was vested in him as mortgagee. If the indebtednes existed, there was a separation of it and the title to the land; precisely the same as if the notes had been assigned to one person and the land conveyed to another. The grantee in such a case is merely a naked trustee, without interest in the indebtedness. When Cabanne died he left ten or twelve heirs at law, and whatever title he had under this mortgage passed to and vested in these heirs as tenants in common, each one having an undivided share. A conveyance by one of them would pass the undivided interest vested in him—no more.

The grantee would become seized of such undivided share as a legal title, and be entitled to recover or hold such undivided interest—no more.

The only way in which the debt evidenced by the notes described in the mortgage could be transferred, was by an assignment of the notes, and the mortgage would pass as an incident. An assignment of the mortgage deed, or a conveyance of the land by the mortgagee, would not pass the debt, but only a naked legal title.

Jackson v. Blodgett, 5 Cowen 202.
Smith v. Smith, 15 N. H. 55.
Keyes v. Wood, 21 Vt. 331.
Wilson v. Troup, 2 Cowen 195.
Sumner v. Waugh, 56 Ill. 571.
Mark v. Wetzlen, 39 Cal. 249.
4 Kent 160, 161, 193, 194.

In Illinois every mode of foreclosure is barred when the debt secured is barred.

Pollock v. Maison, 41 Ill. 516.
Harris v. Mills, 28 Ill. 44.

When the defendants, being in possession of one quarter section out of fifty, under a prior title by a quit-claim deed of five-sevenths undivided, coming from the heirs of the mortgagee in 1861, forty years after the notes, secured, were due, without any interest whatever in the indebtedness, when there could be no recovery or foreclosure even, this debt was still unpaid, they were not holding under the mortgage for the benefit of some unknown holder of the debt. They were claiming thereby to be the owners in fee of such undivided shares of the land. Their claim rested on the theory that the legal

title was vested in the mortgagee, and could be passed by descent and deed.

Contrary to these facts and principles the court below treated the mortgage as a living mortgage, where there had been no separation of the debt and title, and the holders of both had made an entry to receive rents and profits, to be applied in liquidation of the debt. The jury were told that the grantee of five-sevenths of the heirs of the mortgagee, under these circumstances, could hold the possession of the entire tract until the debt was paid. The plaintiff insists that this was an entire misapprehension of the case, and is not supported by any authority.

The plaintiff was entitled to recover three-sevenths undivided, if this was the only defense.

2. There was a presumption that the debt secured by the mortgage had been paid and the title of the mortgagee ended.

The court below refused to instruct the jury, on the prayer of the plaintiff, that there was a presumption on the facts proven, that the debt secured by the mortgage was paid in due course of administration of the estate of O'Hara in Missouri. Exception was also taken to the recapitulation of certain evidence, as tending to rebut the presumption of payment of the notes arising from lapse of time. The court did instruct the jury, that if the mortgage was paid, the defendants could not necessarily hold under it, and that by the common law, after the lapse of twenty years, the law presumes the payment of a debt under seal. But the court proceeded to state certain circumstances which might be considered by the jury in rebutting that presumption, leaving the question to be decided by them. (Rec. 41, 42.)

The court ignored the fact that the debt and right of foreclosure might be barred by limitation laws, and refused to recognize the laws of Missouri in regard to the settlement of estates. In the facts recited, the court proceeded upon the theory that no action could be taken to collect the debt outside the State of Illinois, and that a foreclosure could not be had unless the heirs of the mortgagor were in that State.

This is manifest error. O'Hara died in Missouri, the place of his residence, and the laws of that State provided for administration upon his estate there. Creditors had the opportunity to present their debts for allowance and payment. It was impossible to institute a suit at law anywhere to recover on these notes. On these facts there is a presumption of law that the notes were paid, or if not, they could not be allowed against the estate after the lapse of time fixed by the statute.

If any suit could be sustained against the minor heirs, it would be for assets descended, and could be instituted wherever they were. It is immaterial where they were, for there are limitation laws in every State and country, and these notes were long since barred by all limitation laws. So far as the lands were concerned, these could be reached by administration in Illinois, where the lands could be sold to pay debts, or by a proceeding in chancery to foreclose the mortgage. Either of these steps could be taken in Illinois, regardless of the residence of the heirs of O'Hara. By the law of Illinois the proceeding to sell lands for the payment of debts cannot be commenced after the lapse of a reasonable time, which is fixed by analogy at seven or twenty years.

McCoy v. Morrow, 18 Ills. 522.

The proceeding to foreclose the mortgage was lost long before the heirs conveyed to the defendant in 1861.

Under these circumstances, it was the duty of the court to charge the jury that there was a presumption of payment, and the mere fact that O'Hara left minor children, who soon lost their mother, and who had never resided in the State, and that there was an absence of proof as to attention to the land by them, could not overthrow such a presumption. Even if they could, the court erred in not calling the attention of the jury to such other facts as were material in reaching a conclusion.

3. The court erred in deciding that the legal title was in the mortgagee.

The discussion of this point involves an examination of conflicting authorities. The original doctrine was that the legal title passed immediately to the mortgagee, and gave him a right of entry on the mortgagor before condition broken. But that doctrine has been exploded. Some of the later cases hold that the legal title vests upon condition broken, when the mortgagee can enter or recover possession. Other cases hold that the legal title remains in the mortgagor until actual foreclosure. This is the law in Illinois.

I do not care to argue or press this point, because I suppose the judgment must be reversed for other errors. Attention is called to it, so that the plaintiff may not be prejudiced unless the court deems it necessary to decide it. If a re-trial is had this point may become important.

W. C. GOUDY,
Attorney for Plaintiff in Error.

In the

SUPREME COURT

OF THE UNITED STATES.

No. 288.

GEORGE A. KIBBE,
Plaintiff in Error.

—*vs.*—

SAMUEL DITTO and
AMOS DUNN,
Defendants in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Points and Argument on the Part of the Defendants in Error.

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IN THE

Supreme Court of the United States.

No. 288.

GEORGE A. KIBBE,
Plaintiff in Error.

—*vs.*—

SAMUEL DITTO and
AMOS DUNN,
Defendants in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Points and Argument on the Part of the Defendants in Error.

This case involves the title to the South East quarter of Section 19, Township 13, North of Base line, and Range 3 West of the 4th Principal Meridian in the County of Mercer, and State of Illinois.

The Plaintiff in Error and plaintiff below, in maintaining his title to the premises in question, by his action of ejectment, showed title by a chain of conveyances from the United States in one William M. O'Hara, whose daughter and heir-at-law, Helen O'Hara Harrell, conveyed the premises in question to the plaintiff.

The defendants in the court below, and the Defendants in Error here, deduced title to the premises in question by a

chain of conveyances from William M. O'Hara, under a mortgage to John P. Cabanne, given by said William M. O'Hara and Susan O'Hara, his wife, and a decree of foreclosure and sale of the mortgaged premises rendered in the circuit court of Pike county, Ills., in April, 1822; John P. Cabanne, the mortgagee, being the purchaser, and the sale being confirmed by the decree of the court.

The plaintiff in error contends that the mortgage was not properly executed, and that the decree of foreclosure was irregular, and no sufficient service was had upon the heirs of O'Hara, aud that the decree was void, and that the title to the premises descended to the heir-at-law of William M. O'Hara, namely, Helen O'Hara Harrell, the widow of Abraham D. Harrell, and passed from her to the plaintiff.

Defendants in Error insist that the mortgage was duly executed, and that the decree of foreclosure was valid, and by virtue thereof a complete divestiture of the title to the premises of the heir-at-law of William M. O'Hara was effected, and an absolute title was, under the decree of foreclosure, acquired by John P. Cabanne, the mortgagee and purchaser, which passed through several mesne conveyances, to the defendants in this suit, who for a long series of years prior to the commencement of this suit, have remained in the quiet and undisturbed possession of the premises, and who are entitled to hold the same as mortgagees in possession, even though the foreclosure proceedings are held irregular and invalid. Even under the limitation statute of the State the defendants would be protected, but for the legal disability of Mrs. Helen O'Hara Harrell, the benefit of which the plaintiff claimed, as her grantee; but we rely upon our title as sufficient, independent of any question as to the limitation, to sustain the judgment of the court below.

I.

The objections taken to the execution and acknowledgment of the mortgage upon which the defendant's title depends, cannot be sustained, for the following reasons:

1st. In the first place the objection taken was too general, and was not of a character sufficiently specific to sustain an assignment of error upon the ruling of the court in regard to the introduction of the mortgage in evidence.

The language of the bill of exceptions, following the offer of the mortgage in evidence, and found on page 9 of the printed transcript of the Record, is as follows: "to the "reading of which the plaintiff objected, because it was not "proved or acknowledged, so as to entitle the defendants "to read it in evidence, and because a certified copy is not "evidence. Making, however, no objection for the want "of foundation."

It is not enough, to make an objection to the introduction of a deed or mortgage upon the ground that it is not properly proved or acknowledged.

It is not enough that the objection is broad enough to cover the point intended to be raised. It is the duty of counsel complaining of the ruling of the court to show that the specific objection actually existing to the proof or acknowledgment was distinctly pointed out so as to apprize the court of the precise character of the objection intended to be taken, and not leave the matter to conjecture, or compel the court to guess what the real point of objection actually is.

The rule upon this subject is too well settled by the authorities, as well as by the practice of this court, to admit of question, as the following authorities will show:

McNitt v. *Turner*, 16 Wallace, 352, 362.
Sargent v. *Kellogg*, 5 Gilman, 273, 281.
Burton v. *Bailey*, 27 Ill., 409, 410.
Conway v. *Case*, 22 Ill., 127, 139.
Davis v. *Rawson*, 26 Ill., 100, 105.

Button v Driggs 20 Wall.

Swift v. *Whitney*, 20 Ill., 144, 145.
Russel v. *Whiteside*, 4 Scam., 11.

Thus it will be seen that the rule applies as well to the introduction of an instrument in evidence, as to an exception, to a charge of the Court.

The reason of the rule is obvious. If the objection was specific instead of general, so as to apprize the adverse party as well as the Court of the precise ground of objection, the difficulty might be obviated by the introduction of other proof of the execution of the instrument, or even by the offer of some other instrument to supply the place of the one objected to, and not obnoxious to the same objections.

The same view is applicable to this objection to the certified copy of the mortgage.

The statute authorizes the introduction of a copy in the absence of the original, where the original is outof the power or control of the party offering the copy.

The furnishing of the affidavit or oath as a foundation for the introduction of a copy was expressly waived, and no reason is stated why the certified copy of the mortgage was not admissible in evidence, as in ordinary cases under the statute.

2d. In the second place, no good objection existed, in fact, to the proof or acknowledgement of the mortgage. The objections now urged, even if they had been properly taken, are not well founded in fact.

The objection that the officer taking the acknowledgment omitted to certify to the identity of the party making the acknowledgment, or that he personally knew him, is not well taken, for the reason that the law then in force did not require the certificate to so state. Subsequently, the statute was amended, so as to render such a statement in the certificate necessary, but it was not requisite at the time this mortgage was acknowledged.

Ayres v. *McConnel*, 2nd Scam., 307

Carpenter v. *Dexter*, 8 Wallace, 516, 426

The objection that a Notary Public was not authorized by the law then in force, to take the acknowledgment of this mortgage, is obviated by curative statutes, passed one in 1829, and the other in 1847, authorizing notaries public to take the acknowledgment of deeds, and validating the acknowledgment of all deeds or mortgages acknowledged before a Notary Public, although executed and acknowledged prior to the passage of the acts referred to, which are retroactive in their operation by their express terms.

The first of these statues passed January 22nd, 1829, and found on page 487 of Purple's Real Estate Statutes, contains in the first section, the following proviso :

" *All deeds which have been*, or may be acknowledged " or proved in the manner prescribed in this section, shall " be deemed as good and valid in law, as if the same had " been acknowledged or proved in the manner prescribed " in the ninth section of the act to which this is an amend- " ment." (Referring to the law then in force.)

The act of February 22nd, 1847, authorizes the acknowledgment of deeds before notaries public and other officers therein named; is similar in its character and operation to the act of 1829, and contains the following proviso :

" All deeds and conveyances *which have been* or may be " acknowledged or proved in the manner prescribed by " this section, shall be entitled to record, and be deemed " as good and valid in law, in every respect, as if the same " had been acknowledged or proved in the manner pre- " scribed " by a previous law, specifying the officers authorized to take acknowledgment of deeds.

These statutes are, in their nature, remedial, and as such, are entitled to receive a liberal rather than a strict or technical construction. The well known rule of law in such a case is, that the act is to be so construed as to " advance the remedy and suppress the mischiefs " contemplated by it. And this rule is applied, even at the ex-

pense of sacrificing literal terms or express words to the general object and spirit of the enactment.

The two acts just cited apply in express terms to all deeds which have been theretofore executed.

The first act authorized in its first section the acknowledgment of deeds before a Notary Public, in the following language, viz :

" All deeds and conveyances of land lying within this " State may be acknowledged or proved before either of " the following named officers, to wit, any judge or justice " of the Supreme or District Court of the United States; " any commissioner to take acknowledgments of deeds; " any judge or justice of the Supreme, Superior, or Cir- " cuit Court of any of the United States or their territories; " any clerk of a court of record; mayor of a city, or notary " public; but when such proof or acknowledgment is " made before a clerk, mayor, or notary public, it shall be " certified by such officer, under his seal of office."

Section first of the act of 1847, just referred to, authorizes notaries public to take the acknowledgment of deeds in the following words, namely :

" Be it enacted, &c., that all deeds and conveyances of " lands lying within this State may be acknowledged or " proved before either of the following named officers, to " wit, any judge or justice of the Supreme or District " Court of the United States; any commissioner to take " acknowledgments of deeds; any judge or justice of the " Supreme, Superior, or Circuit Court of any of the United " States or their territories; any clerk of a court of record; " mayor of a city, or notary public; but when such proof " or acknowledgment is made before a clerk, mayor, or " notary public, it shall be certified by such officer, under " his seal of office."

This section further authorizes justices of the peace to take acknowledgments, and prescribes the proof necessary to verify his official character, and then declares that :

" All deeds and conveyances which have been or may " be acknowledged or proved in the manner prescribed in " this section, shall be entitled to record, and shall be " deemed as good and valid in law, in every respect, as if " the same had been acknowledged or proved in the man- " ner prescribed in the 16th section of the 24th chapter of " the Revised Laws, to which this act is an amendment."

Neither this section nor any other section of the act, prescribes the form of the acknowledgment, except that the second section provides that the execution and acknowledgment by a married woman, joining with her husband in the execution of a deed, shall bind her as effectually as if she were sole.

The whole effect and design of this section of the act, so far as it relates to deeds executed prior to its passage, was to render as valid such acknowledgments as were taken by any of the officers named in this act, including Notaries Public, as if they had been taken before officers legally authorized to take the same. This being a remedial statute, is to receive a liberal, in contradistinction from a technical, construction, so as to effectually accomplish the obvious purpose and design of the act.

Both of these acts, as we have already seen, are retroactive in their character, covering all deeds executed and acknowledged prior to the passage of these curative statutes.

Thus the defect in the acknowledgment, on account of the officer taking it, is effectually cured.

This Court held, in the case of *Carpenter* v. *Dexter*, 8th Wallace, 513, 525, that this statute of 1847 had the effect to cure the acknowledgment of a deed executed in 1818 before a justice of the peace who was not authorized, by the laws of Illinois in force at the time of the acknowledgment, to take the same, but who was embraced within the terms of the curative act of 1847.

It is argued that the statute cannot have this effect in

this instance, for the reason that the act of 1827, as well as the revised statutes of 1845, required the officer to certify to the personal identity of the party making the acknowledgment, and that the officer knew the party acknowledging the deed, and that, though the acknowledgment of the deed was cured, so far as relates to the officer authorized to take the acknowledgment, yet it was defective for want of this certificate of identity.

The obvious answer to this objection, however, is, that the laws in force at the time the deed was executed and acknowledged, did not require that the officer should certify that he personally knew the party making the acknowledgment.

Ayres v. *McConnel*, 2d Scammon, 308.
Carpenter v. *Dexter*, 8 Wallace, 526.

This precise objection was made in the case of *Carpenter* v. *Dexter*, in the 8th Wallace. The deed, however, was held to have been properly acknowledged, by virtue of the curative provisions of the act of 1847, notwithstanding the omission of the officer to certify that the party acknowledging was personally known to him.

The case of *Adams* v. *Bishop*, 19 Ill., 395, is cited as authority to the contrary, as showing that the certificate must be perfect in both respects, and that the curative act, remedying the defect, as to the officer taking the acknowledgment, left the deed obnoxious to the other objection of the omission of the certificate of identity, which was held fatal to the validity of the deed, or the proof of its execution.

The obvious difference, however, between that case and this is, that the deed in that case was acknowledged after the act of 1827 took effect, which rendered such a certificate, as to the personal identity of the party making the acknowledgment, necessary on the part of the acknowledging officer. That law, being then in force when the deed was acknowledged, made it necessary for the acknowledg-

ing officer to conform to it, in taking and certifying the acknowledgment; while in regard to this deed, the act of 1827, not being in force at the time of its acknowledgment, and there being no law in force at the time of its execution, requiring such a certificate from the acknowledging officer, the acknowledgment cannot be objectionable upon this ground. The only defect in it relates to the officer taking it, and that is cured by the act of 1829, as well as by the act of 1847.

Statutes are not retroactive in their operation, and are not to be so construed, unless made so in express terms; and an act passed in 1827, requiring the officer to certify in his certificate of acknowledgment that the party was personally known to him, could not invalidate the acknowledgment of a deed acknowledged in 1818, and good, so far as this objection is concerned, under the laws then in force.

Statutes of this character are made retroactive, in order to cure instruments defectively acknowledged; but they are never made retroactive for the purpose of rendering irregular and void an acknowledgment good in form at the time it was taken, and under the laws then in existence.

Such an act, instead of being a curative statute, would be highly dangerous in its character, and extremely unjust in its operation upon individual rights.

It is true, a curative act, remedying a defective acknowledgment in respect to the officer authorized to take it, might be conditioned upon the acknowledgment's being, in all other respects, conformable to subsequent statutes, and to the statute regulating acknowledgments in existence at the time the curative act was passed.

But no such design is apparent from the statute; nor is it reasonable to attribute to the Legislature any such intention, where the object was to cure acknowledgments in ancient deeds, or deeds executed years prior to the passage of the act.

The acts of 1829, and of 1847, both refer specifically and exclusively to the particular sections, respectively, of the prior acts of 1827 and 1845, designating the officers before whom the acknowledgments could be taken, and containing no other provision.

The obvious reading of the statutes, therefore, of 1829, and of 1847, as well as the general purpose and character of curative acts of this description, clearly indicate that the sole design of the Legislature, in passing these curative acts, was to remedy the defect arising from the want of power in the officers, who had taken these acknowledgments, to take the same, and, notwithstanding such defect, to render such acknowledgment valid and effectual, precisely as though the deed had been originally acknowledged before some officer then authorized by the existing law to take acknowledgments.

It has been still further suggested that these curative acts have since been repealed.

If this be so, however, it is entirely immaterial.

The rule of construction, as to the operation of a repealing statute, is, that the act repealed simply ceases to operate from the time of its repeal. The repealing statute does not invalidate acts and proceedings done under, or already affected by, the act repealed. It is simply prospective in its operation.

Besides all this, the various repealing laws of the State of Illinois—both those accompanying the revision of 1845, as well as those accompanying more recent revisions—have all been passed with the express proviso that they shall not be retroactive in their operation, or affect acts or proceedings done under, or rights acquired by virtue of, the act repealed, and while the same remained in force.

This safeguard — essential to the protection of private rights, and recognized at common law in the construction of repealing statutes — is adopted by express enactment, to avoid the possibility of any such construction as is

sought by the counsel for the plaintiff in error to have adopted in this case.

The mortgage deed in question, whose execution is contested in this case, was executed over half a century since. It has been acted upon and recognized as a muniment of title ever since that time. Courts have recognized its validity, and judicial proceedings have been taken upon the assumption of its due execution. Proceedings to foreclose the mortgage have been taken, and a decree of foreclosure was actually pronounced by a court of competent jurisdiction, foreclosing the equity of redemption upon this mortgage, fifty years ago.

Under this decree, the land in question was sold, and a deed executed to the purchaser, and the title thus derived has been recognized as valid both by this court, and by the Supreme Court of the State of Illinois (in the case of *Morrill* v. *Cone*, 22 How., 75) and under this title, thus recognized, both privately and publicly, by individuals, and by courts of justice, the land has been held adversely, in fact actually occupied, for a long series of years, more than double the period of the ordinary statute of limitations, and which would itself under the statutes of the State of Illinois bar an action of ejectment, but for the exemption of *femmes covert*, from its operation, by virtue of which the plaintiff in error claims to protect himself from its effect, as grantee of Mrs. O'Hara Harrell.

In such circumstances, every demand of justice and reason requires that courts should construe curative and remedial statutes, applicable to this case, with the utmost liberality, and should induce them to avoid any hypercritical construction of statutes, or judicial proceedings, by which private rights are to be sacrificed, and titles honestly acquired and held for a long series of years are to be overturned, and innocent and hardy settlers are to be made to surrender their rights to the behest of speculators seeking to amass property by the ruin of farmers and

others, who have given value to the farming lands of the Western States, and upon whom the prosperity of the country largely depends.

These lands since the execution of this mortgage deed, have by the improvement of the country and the cultivation and improvement of the land covered by the mortgage, which includes fifty quarter sections, risen in value from the price paid to the government, to $50 or $60 per acre.

During all this long period of time, parties witnessing the execution of these ancient deeds have died. The deeds themselves cannot be found. The clerk's office where the foreclosure proceedings were had has been searched and the original papers cannot readily be found. Every principle of private interest and public policy, demand that these titles should be respected and recognized as valid, and acts of the legislature validating their execution and acknowledgment, should receive a liberal and benign construction, and a construction calculated and adapted to secure in full force the obvious design of the legislature in these enactments.

We further submit that the mortgage in question was properly acknowledged under the laws of Missouri, and that a notary public in that State had authority to take the acknowledgment of deeds and commercial instruments, at the time of the execution of this mortgage, and by virtue of the statutes of Illinois, all deeds which have been acknowledged in other States, according to the laws of the State where the acknowledgment was taken, are admissible in evidence with the same effect in all respects as if they had been properly acknowledged according to the laws of the State of Illinois, then in force. This was the effect of the provisions of the first section of the act of 1802, while Illinois was still a territory, and the same provision has been substantially re-enacted in various statutes since that time.

The act of December 30, 1822, (Purple's Real Estate statutes, page 467,) provides as follows:

"*Be it enacted* by the people of the State of Illinois, "represented in the General Assembly, that all deeds, "mortgages, transfers, conveyances, &c., which shall have "been, or may hereafter be perfected and executed ac- "cording and in conformity to the laws of the State or ter- "ritory in which they may be respectively made, for lands "within this State, shall be and are hereby declared to be "valid to all intents and purposes," &c.

The title under this mortgage having passed by virtue of various mesne conveyances to the defendants in error, they are entitled as mortgagees in possession, independent of the foreclosure proceedings and decree which we shall hereafter advert to, and holding the legal title to the property, to retain possession as against the mortgagor and his heirs, and as against the world, unless the mortgage has been actually paid, and even then, the remedy of the plaintiff in error is not an action of ejectment, but a bill in chancery.

Brobst v. *Brock*, 10th Wallace, 519.
Hill v. *Payson*, 3rd Massachusetts, 559.
Parsons v. *Wells*, 17th Massachusetts, 419.
Hooper et al. v. *Scheimer*, 23rd Howard, 235.
Fenn v. *Holme*, 21st Howard, 482.
Sheirburn v. *Cordova et al.*, 24th Howard, 430.

Under the decision in the 10th of Wallace, even though the foreclosure proceedings were irregular, and the decree void, as against the mortgagor or his heirs, nevertheless the purchaser under the decree of foreclosure would take the legal title of the mortgagee, and the mortgagor would be estopped by the foreclosure proceedings taken at his instance, from questioning the validity of the purchaser's title acquired under such proceedings. Although he might not take an absolute title on account of the defect in the

decree and proceedings, he would still acquire the title of the mortgagee.

It is unnecessary however, to invoke the aid of this principle in this case, for the reason that the purchaser was the mortgagee himself, and the title of the mortgagee and purchaser was acquired by the defendants, so that they occupy in fact, to all intents and purposes, the position of the original mortgagee; and being lawfully in possession, cannot be ousted from the premises by the mortgagor or his heirs.

Again, the presumption of payment insisted on, on the part of the plaintiff, is rebutted by the absence of the mortgagor abroad, by his non residence from the State, which appears from the deposition of Helen O'Hara Harrell, on page 21 of the printed abstract of the record.

8th Connecticut Reports, 175.

Bailey v. *Jackson*, 16 Johnson's Rep., 210, 214.

Statutes of Limitation of the State of Illinois, Chap. 66, Revised Statutes of 1845, Vol. 11, p. 350, Sec. 13 :

" If any person or persons against whom there is or " shall be any cause of action, as is specified in the pre- " ceding sections of this chapter, except real or possessory " actions, shall be out of this State at the time of the cause " of such action accruing, or any time during which a suit " might be sustained, on such cause of action, then the " person or persons who shall be entitled to such action, " shall be at liberty to bring the same against such " person or persons, after his, her or their return to this " State, and the time of such person's absence, shall not be " accounted or taken as part of the time limited by this " chapter."

The common law presumption of payment in 20 years may not only be rebutted by proof of the absence of the party from the State, but in various other ways, as by public proceedings judicially taken to foreclose a mortgage,

whether these proceedings were strictly regular or not. They were notorious facts tending to rebut the presumption of payment.

Brobst v. *Brock*, 10th Wallace, 519.
18 Missouri, 530.
Chonteau's Ex'r v. *Burlando*, 20 Mo., 488.
Jackson v. *Pierce*, 10 Johnson's Rep., 417.
1st Vol. Cowen & Hills notes to Phillips' Evidence, 459.
2 Hillard, on Mortgages, 3 and 5.
Jackson v. *Sackett*, 7 Wendell, 94.
Gray v. *Gardner*, 3rd Massachusetts, 398, 401.

II.

The objections taken to the deed of Starr, the commissioner under the decree of foreclosure to Cabanne, the purchaser and mortgagee, were not well taken.

1st, for the reason that the objection is a general and not a specific one.

The language of the objection found on page 17 of the Abstract is, "that the deed was not proved or acknowl- "edged according to law."

Such an objection, as we have already seen, is not sufficient to sustain an assignment of error, or to authorize the appellate tribunal to review the decision of the court below.

In the second place, this acknowledgment seems to have been taken in open court, and to have been made by the officer conducting the sale under the sanction and authority of the court. It was as much a part of the record and proceedings of the court, as his report of sale, and the report of sale as well as the deed of conveyance seems to have been approved by a decree of the court, found on pages 34 and 35 of the Abstract. After the recital of the deeds executed by the commissioner, Henry Starr, includ-

ing this deed to John P. Cabanne of the date of the 20th of February, 1823, the record proceeds: "Thereupon "the court allow and approve of said deeds, and order the "acknowledgment to be certified."

This mode of acknowledging official deeds seems to have been in vogue at the time this deed was executed, and seems to have had the sanction of both legislative and judicial authority.

Breese' Reports, 201, 202 and note.
Fail et al. v. *Goodtitle.*
Purple's Real Estate Statutes, pp. 306, 308, Act of Sept. 17, 1807.

This act applies to execution sales, and sales on mortgage foreclosure (by *scire facias*), and provides that "the "sheriff or other officer shall make return," &c., "and "give the buyer a deed duly executed and acknowledged "in court, for what is sold."

3rd. If the objection to the proof or acknowledgment of this deed was properly taken, and the court erred in allowing the introduction of the deed in evidence, still the error, if one was committed, was one which could not by legal possibility have worked any injury to the plaintiff in error, for the reason that the decree itself operated as an extinguishment of the equity of redemption, leaving the legal title in Cabanne, in whom it stood originally by virtue of the mortgage, and by virtue of this legal title which passed to the defendants, and whether it remained conditional, or passed into an absolute title by virtue of the decree, the defendants had a right under it to maintain their possession, and to defeat the action of the plaintiff below.

4th. The facts proved on the trial, and appearing from the record in this case, of an attempted foreclosure and decree, and of a deed executed by the mortgagee purporting to convey an absolute title and possession taken and held by the defendants as remote grantees of the mortgagee, furnish satisfactory evidence to authorize the pre-

sumption of an extinguishment of the equity of redemption, and of a deed duly executed, releasing such equity of redemption.

18 Mo. Rep., 530.
1 Phillips' Ev., 560 marginal paging, 671, 558, m. p. 669 and cases cited.
6 Harris & John., 336.
26 N. H., 55.
Valentine v. *Piper*, 22 Pick, 85.
White v. *Loring*, 24 Pick, 322.
12 John., 357.
Park v. *Jackson*, 11 Wend., 455.
1 Caine's Cases, 1 to 18.
Jackson v. *Woolsey*, 11 Johns., 456.
Gray v. *Gardner*, 3 Mass., 401.
1 Phillips' Ev., 664 to 666.

That the equity of redemption is presumed to have been extinguished, and that the mortgagee even before extinguishment of the equity of redemption, is vested with the legal title also, will fully appear from a reference to the following authorities :

Brobst v. *Brock*, 10 Wallace, 519.
Carroll v. *Ballance*, 26 Ill., 15.
Nelson v. *Pinegar*, 30 Ill., 473.
Williams v. *Brunton*, 3 Gilman, 610–622.
Fetrow v. *Merriwether*, 53 Ill., 278.
Kenyon v. *Shreck*, 52 Ill., 386.
Ralston v. *Hughes*, 13 Ill., 482.
Johnson v. *Adleman*, 35 Ill., 274.
2 Hilliard on Mortgages, page 2.
Williams v. *Brunton*, 3 Gilman, 611–623.

III.

The decree of foreclosure was regular and valid, and was sufficient to bar the equity of redemption and to divest

the heirs of the absolute title to the land conveyed by the mortgage.

The objections taken to the decree cannot be sustained.

We claim, not only the benefit of the general presumption in favor of a decree of a court of general jurisdiction, but we rely also upon the evidence contained in the decree itself of the due service of process upon the parties affected, and we claim that the decree shows affirmatively upon its face, that it was regular and valid for all intents and purposes whatever, especially when the attempt is made as it is made here, to assail the same collaterally.

The objections taken to the decree of foreclosure proceedings appear upon the 14th page of the printed copy of the record, in the following language, viz :

" The plaintiff objected to reading the same, because " such proceedings did not embrace nor relate to the land " in controversy; the plaintiff, nor those under whom he " claimed were not parties or privies to such proceedings, " and they were void for want of jurisdiction in the Circuit " Court of Pike County over the persons of the defendants, " or the subject matter."

So far as the question of jurisdiction is concerned, the objection seems to have been general, and no specific defect seems to be pointed out by the objection, by reason of which the validity of the decree and proceedings were challenged.

For some reason, but for what particular and specific reason is not stated, it is objected that jurisdiction over the parties defendant was not properly acquired.

If this general mode of objecting to the decree and proceedings is held sufficient, then we insist that jurisdiction over the person was acquired upon the following grounds, namely :

1st. The Circuit Court of Pike County was a court of general jurisdiction, and as such, its decrees are of them-

selves, presumptive evidence of jurisdiction, without any express or affirmative proof whatever.

When a court of general jurisdiction pronounces a judgment or decree, the law presumes such decree to be valid, and to have been pronounced only after jurisdiction duly acquired over the parties and the subject matter.

Florentine v. *Barton*, 2 Wallace, 210.

2nd. The decree shows upon its face affirmatively, that an order for an appearance of the defendants, who were non-residents, was made by the court, and that the same was published three weeks successively in the *Edwardsville Spectator*, as required by said order.

From the statute in force at the time of the commencement of the foreclosure suit and the making of the order, it appears to have been duly authorized by the statute providing for constructive service on defendants, who are out of the jurisdiction of the court, and non-residents of the State.

The proof in this case, moreover, outside of the decree, shows, as appears from the deposition of Helen O'Hara Harrell, that the defendants in the foreclosure suit were all non-residents of the State at the time these proceedings were taken.

The statute authorizing this mode of service is found in the session laws of the State of Illinois of 1819, page 171, sec. 9, and is as follows :

" Be it further enacted that if any defendant in chancery " (if but one,) or defendants, (if more than one,) reside out " of the State, or cannot be found, to be served with " process of subpœna, or abscond to avoid being served " therewith, public notice shall be given to the defendant " or defendants, signed by the clerk, in any newspaper " printed in this State, or in any adjoining State or terri- " tory, as the court may direct; that unless he, she, or they " appear and file his, her, or their answer by a day given

" them or him by the court, the bill shall be taken *pro* " *confesso.*"

This statute, as will be seen, prescribes no form for the notice, and specifies no time for its publication, but the matter seems to be left to the discretion of the court, the whole matter to be determined in the language of the statute, " as the court may direct."

The mode of service adopted under the direction of the court, seems to have been the publication of the order of the court, requiring the defendants to appear and file their answers on or before the first day of the next October term, three weeks successively, in the *Edwardsville Spectator*. The decree finds the fact that this notice or copy of the order was duly published " as required by said order." The presumption of law from this recital in the decree, and from the order of the court made in the premises, is, that a due and sufficient notice was published, and proper constructive service was had upon the defendants, and that such notice and service was, in all respects, sufficient, both in form and substance.

There is nothing to rebut this legal presumption; the notice itself is not produced by either party, and after the lapse of fifty years, and the destruction of the clerk's office by fire, it is not surprising that the notice is not to be found, and no intendments against its sufficiency or validity can, in the circumstances, be indulged.

It also appears, from page 11 of the printed record, that a similar order was made in the case of *Daniel C. Boss* v. *John Adams, and Elizabeth, his wife*, as required by the statute, and which is given in full in the record; and immediately following are the cases of *Robert Simpson, Complainant*, v. *Susan O'Hara et al., Defendants*, and the case of *John P. Cabanne, Complainant* v. *same defendants.*

The record then proceeds as follows, viz: " Ordered " that the same notice be given in the two last cases as in " the one immediately foregoing."

Such an order is, of course, to receive a reasonable construction, and means, of course, a notice and order similar, in all respects, to the notice and order in the first case mentioned, except that it is an order in the other cases, and to be so entitled. No hypercritical construction will be adopted in reference to this order and this mode of constructive service, fifty years after a judicial decree is pronounced founded upon such service, for the purpose of invalidating it.

The order and notice, as published in the *Edwardsville Spectator* is not produced, nor is it necessary that it should be produced.

The decree expressly finds the fact that such service was duly had, and that is enough. The clerk's office was destroyed by fire.

The defendants in error were unable to get hold of the files. The presumption is that the notice was in conformity with the order, and that both were authorized by law.

Exception may be taken to the fact that the names of the defendants do not appear from the proceedings.

The name of Susan O'Hara, the widow, however, is expressly given, and from the order of confirmation of the report of Henry Starr, Commissioner, immediately following the decree for foreclosure and sale—page 13 of the printed record—they appear to be as there stated:

" Susan O'Hara, widow, and others, the children and " heirs-at law of William M. O'Hara, deceased, def'ts."

If it be still objected that the names of the infant children are not given in the order, we reply, in the first place, that if this were necessary, the presumption of law is that they were duly inserted in the notice, inasmuch as the Court found by its decree, due service by publication, which finding is to be presumed to be correct; and, in the second place, we insist that it was wholly unnecessary that the names of these children should have been inserted in the notice, or in the proceedings. Whether they

had all been christened at this time, and whether they had any names other than that of their father, Wm. M. O'Hara, whose name appears in full in the bill filed and found on page 35 of the printed record, does not appear. It cannot be impossible to obtain a decree against an infant defendant, who has not received a name, and has no Christian name whatever.

Where actual service is had, it is good, where the party has no name, or even where he has a name, but is misnamed in the process and proceedings, or served by a wrong name. Where such fact appears, jurisdiction will be acquired, and so long as no plea of misnomer is interposed, and no attempt made to assail the proceedings directly, the judgment or decree founded upon such service will be held valid.

The order, notice and proceedings in this case identify the parties defendant, Susan O'Hara, by name, and as the widow of William M. O'Hara, and the other defendants as his children and heirs-at-law.

They are thus as distinctly and satisfactorily identified as the parties defendant intended to be sued, as though they had been actually and personally served with process.

The whole object and purpose of the statute, and of the proceedings under it, are as fully and effectually accomplished in this way as they could be in any other way.

Various modes of substituted service have been frequently adopted by the English courts of chancery which have been treated and held as valid, as the ordinary and regular mode of service. 1st Vol. Daniels' Chancery Practice, (4th Am. ed.), 448, and cases cited in note.

" Substituted service upon the mother in one case, and " upon the father-in-law in another, was ordered to be " good service."

The latter mode of service was held to be good in

Thompson v. *Jones*, 8 Vesey, 141.

Uuder a similar statute of the State of Illinois, upon a

petition by an administrator for the sale of the real estate of the deceased, constructive service of notice upon the heirs by publication, was held to be good, although the notice and proceedings omitted altogether the *names of the heirs.*

In the case of *Morris* v. *Hogle*, 37 Ill., 155, Chief Justice WALKER thus disposes of this objection :

" It is also urged that the County Court failed to acquire " jurisdiction, because the names of the heirs and persons " in interest, did not appear in the petition or notice, nor " do they in fact appear anywhere in the entire proceed- " ing. This may be error for which such an order would " be reversed on error, but we are not prepared to hold " that for that reason, the court failed to acquire jurisdic- " tion. In the case of *Stow* v. *Kimball*, 28th Ill., 93, the " court inclined to hold that such an omission did not affect " the jurisdiction."

In the case of *Cook* v. *Sinnamon*, 47 Ill., 215, it was held that a grant to a man's heirs, although not specially named, would vest the heirs with the title to the property contained in the deed.

It is difficult to see upon principle, why a constructive service by publication of a similar character, should not operate as a valid service at all events until set aside upon error brought.

If the proceeding is voidable, it is, at all events, not void.

46 Mississippi, 31.

Hynes v. *Oldham*, 3d T. B. Monroe, Kentucky Rep., page 266.

Baker v. *Stevens*, 10 Abbott's Practice Rep., 1.

Paine v. *Mooreland*, 15 Ohio, 435.

Voorhees v. *Bank of U. S.*, 10 Peters, 449.

Nations v. *Johnson*, 24 Howard, 195.

Grignon's Lessee v. *Astor*, 2d How, 119.

Florentine v. *Barton*, 2d Wallace, 210.

Again, this is a proceeding *in rem.* It differs from a proceeding *in personam.* The property is within the jurisdiction of the court, and it is a necessrry incident to the ownership of mortgaged property, thus situated, that the mortgagee should have the right to make his mortgage available by obtaining a decree of foreclosure in case of non payment of the mortgage debt, by making his title absolute by a foreclosure and sale, although the parties entitled to the equity of redemption, are not themselves within the jurisdiction of the court, but are non residents of the State.

The proceeding is rather against the property, than against the person, and is very different in its character from an ordinary personal decree against the party where the right involved does not attach upon property within the jurisdiction of the court, but rests in mere personal obligation, and ordinarily requires actual and personal service of process to sustain it, and to validate the decree of the court, as was the case in the case of *Galpin* v. *Page*, 18 Wallace, 350, cited on the other side.

This was the view taken by the court in the case of *Florentine* v. *Barton*, 2d of Wallace, 210, where the court held that a proceeding by an administrator, for the sale of the real estate of an intestate, was practically and substantially, although not technically a proceeding *in rem*, and that where the court had jurisdiction over the subject matter, the presumption was that all the provisions of law, as to notices, had been complied with, and that the pronouncing of the decree was itself presumptive evidence of jurisdiction over the parties, the court having jurisdiction by law, of the subject matter, and they then say :

" The court is not bound to enter on record the evidence
" on which any fact was decided. The proceedings on
" which the action of the court is grounded, are usually
" kept on separate papers, which are often mislaid or lost.
" A different doctrine would (especially after a lapse of

" over thirty years) render titles under a judicial sale " worthless, and a mere trap for the unwary. These " propositions will be found discussed at length, and fully " decided by us in *Grigon's Lessee* v. *Astor*."

In that case the land of the heirs of the deceased, and owned by him at the time of his death, were sold by the administrator, by virtue of a special and private act of the legislature of Illinois.

The report of the case on page 211, 2nd Wallace, states that, " there was no mention whatever in the record, that " any notice had been given to the heirs or to anybody, or " that the estate was in any way indebted," and it was argued there with much greater force than can be argued here, that " a special power granted by statute, affecting " rights and individuals, and which divests the title to real " estate, ought to be strictly pursued, and should appear to " be so on the face of the proceedings."

The court however, held that the judgment and decree of the court, before whom the proceedings were taken, was of itself presumptive evidence of its jurisdiction, notwithstanding the absence of any proof of notice of the proceeding to the heirs, or of any recital to that effect, or of any express finding upon the point or upon the fact of indebtedness, the presumption being from the judgment itself, that jurisdiction attached, and as was remarked by the court in that case, so it may be appropriately said here in reference to this decree of foreclosure.

" That the heirs seem to have acquiesced in the regu- " larity and justice of this proceeding, until the plaintiff in " error, a few years ago, obtained from them a release of " their title, doubtless for the purpose of this litigation."

In the case of *Voorhees* v. *The Bank of the United States*, 10 Peters, 449, above cited, the title to certain real estate in the State of Ohio, was in question and depended for its sufficiency upon, " the validity of a sale of the " premises in controversy, under a judgment of the court

" of Common Pleas of Hamilton County, Ohio, in a case " of foreign attachment."

The attachment proceedings were taken under a special attachment law of that State, which required three months notice given by publication in a newspaper of the issuing of the attachment.

Notwithstanding the absence in the record of any evidence of the publication of the notice and strict compliance with the provisions of the statute, and even upon the apparent assumption that there was not in the case a strict compliance with the law, the court held the title derived thereunder to be valid, and the court say on page 196, that the State court "ordered a sale which was executed, and " on the return thereof gave it their confirmation ; this was " the judgment of a court of competent jurisdiction on all " the acts preceding the sale affirming their validity in the " same manner as their judgment had affirmed the existence " of a debt, * * * * every matter adjudicated be- " comes a part of their record which thenceforth proves " itself without referring to the evidence on which it has " been adjudged. In this case the court issued an order of " sale agreeable to law, which having been returned by " the auditors, and being inspected, the court grant judg- " ment of confirmation thereon ; it is therefore a direct " adjudication that the order of sale was executed accord- " ing to law."

And to the proposition, "that a sale by order of a court " of competent jurisdiction, may be declared a nullity in a " collateral action, if their record does not show affirma- " tively the evidence of a compliance with the terms pre- " scribed by the law in making such sale," the court say :

" We cannot hesitate in giving a distinct and unquali- " fied negative to this proposition, both on principle, and " authority too well settled to be questioned. That some " sanction should be given to judicial proceedings, some " time limited beyond which they should not be ques-

" tioned, some protection afforded to those who purchase " at sales by judicial process, and some definite rules es- " tablished by which property, thus acquired, may be- " come transmissible with security to the possessors, can- " not be denied. In this country, particularly, where " property, which within a few years was of but little " value in a wilderness, is now the site of large and flour- " ishing cities, its enjoyment should be at least as secure " as in that country where its value is less progressive."

And various cases are cited by the court in support of its opinion.

The doctrine of this case has been repeatedly sustained by similar adjudications of this court, both before and since that case.

In the case of *Grignon's Lessee* v. *Astor*, 2 How., 319, the doctrine here contended for, is ably sustained by an elaborate opinion by the court in that case, and various cases cited by the court in support thereof. The court there treated the sale of the real estate of an intestate, upon a petition by the administrator, as in the nature of a proceeding *in rem*, rather than *in personam;* and the decree of the court, authorizing the sale, was held to be "a binding adjudica- " tion; that all facts, necessary to give jurisdiction, as well " as to warrant the license, existed, and that the record " was conclusive evidence thereof."

The same principle applies to the foreclosure proceedings in this case.

Under the laws of Illinois, a judgment is held good, barring the equity of redemption upon a mortgage in a proceeding by *scire facias*, where two successive writs are returned as to the parties " not found," as against the parties, and as against the world.

This was a proceeding to foreclose the mortgage in the course of the ordinary equity jurisdiction of the court. The object to be accomplished was precisely the same as the object of the proceeding by *scire facias*.

It was not, in the ordinary sense, a personal decree against the parties, but operated virtually upon the property itself, situate within the State and within the jurisdiction of the court pronouncing the decree; and, in the absence of some of the defendants from the State, rendered it necessary to resort to the expedient of obtaining service by publication authorized by the statute in such case.

If this service was irregular, on account of the supposed omission of the names of William M. O'Hara's children, it was at most voidable only, but not void.

It identified the parties, intended to be served, by notice, and was, in truth and in law, a notice to them of the existence of the suit, and that they should appear and defend their rights in the property.

There is no question as to the fact of a substantial notice to appear and defend, authorized by the statute, but only as to whether this notice was strictly regular and correct in matter of form.

In the case of *Hynes* v. *Oldham*, 3rd vol. T. B. Monroe's Kentucky Reports, 266, above cited, where a bill was filed against unknown heirs, and where the proceeding to give jurisdiction was by publication against unknown heirs, and where, as the court say that an affidavit was required by statute, to the effect that the names of the heirs are unknown to the complainant, was "expressly required by the act of Assembly (of the State of Kentucky), which authorized a bill in chancery to be "filed against unknown heirs, and that the want of it "would undoubtedly be fatal to a bill on demurrer, and "even render the decree on the bill erroneous, and liable "to be reversed and set aside;" the court, nevertheless hold that the decree was valid, although erroneous, and could not be assailed collaterally, and they say:

"A decree may be erroneous, without being void, and "the legal effect of a decree which is merely erroneous, "and of one which is void, is quite different." And they

say, after referring to the rule of jurisdiction in such case, "tested by this rule, it is evident that the decree in this "case must be deemed merely erroneous, and not void, "for want of the affidavit that the names of the heirs were "unknown to the complainant, for the land for which the "decree was rendered being within the county of Gray-"son, the court clearly had jurisdiction of the case, and "the warning to the defendants being by publication for "two months in an authorized newspaper, was such as "the law requires to authorize a decree against them."

In the case of *Paine* v. *Moorland*, the Supreme Court of Ohio, held — 15 Ohio Rep., 435 — that the omission to publish notice required by the attachment law of that State did not render the proceeding and judgment void, and liable to be attacked collaterally, but voidable only upon error, or appeal brought.

The Supreme Court of Illinois in the case of

Booth v. *Rees*, 26 Ill., 48.

Under an attachment statute, requiring the fact of indebtedness to be *positively* sworn to on behalf of the plaintiff in the attachment, and which they had held (in the case of *Dyer* v. *Flint*, 21 Ill., 80) fatal to the proceedings upon appeal or writ of error, held, nevertheless, that the judgment of the Court was not *void*, collaterally, where the affidavit to authorize the attachment stated the fact of indebtedness upon information and belief only; and this, too, although they had previously held that such an affidavit was wholly insufficient to sustain the judgment and proceedings upon a *direct* proceeding upon appeal to set aside and reverse the judgment.

Dyer v. *Flint*, 21 Ill., 80.

The Supreme Court of the State of Illinois has, moreover, repeatedly held, in reference to applications by an administrator for the sale of the real estate of a deceased person, that the notice of the application, even in the most general form, omitting specifically to name the time and

place of the holding of the Court, was sufficient to sustain the judgment or decree founded on such notice in all collateral proceedings. The test by which the sufficiency of the notice, for this purpose, is determined, as they hold to be, whether the notice is sufficient to apprize a party, of ordinary intelligence, of the proceeding, and when it is to be taken, so that, by reasonable inquiry, he can ascertain the fact.

Upon the doctrine of these cases, it cannot, we insist, be successfully contended that the notice published in the proceeding in question, against the absent defendants, was not merely irregular, but was absolutely void, and especially is this so when the notice itself is not produced, and when we are entitled, upon the well settled rule of construction in such case, to the aid of every possible presumption in favor of its validity.

We contend, however, that even if the notice had been produced, and upon inspection, had been found to be in the form contended for on the other side, it would even then, without the aid of any presumptions in favor of jurisdiction, have been abundantly sufficient to have sustained the jurisdiction of the Court pronouncing the decree under which the defendants below derived their title, or at least, sought to fortify and sustain it.

The case of *Galpin* v. *Page*, 18 Wall., 350, is supposed to furnish some countenance to the position taken on the other side, that this foreclosure decree is without jurisdiction, and void, as against the heirs of William M. O'Hara, and that the earlier cases in this Court upon the question, are thereby overruled or essentially qualified.

The decision of the Court, however, in that case, can only be properly appreciated by careful consideration of the facts of the case, which are materially different from those arising here, and which clearly distinguish that case from the one at bar. In that case, the record showed affirmatively that no jurisdiction ever was acquired over

the defendant, so as to leave no room for the operation of the legal presumption in support of the judgments of superior courts of general jurisdiction, as the presumption could only arise, as the Court held, with respect to jurisdictional facts, concerning which the record is silent.

And in the second place, the decree, founded upon the constructive service of process by publication, was a personal decree, and not a proceeding *in rem*, or in the nature of a proceeding *in rem*. It was a decree adjudging the existence of a certain partnership, and finding that the defendant was a child of one of the partners, directing an account to be taken, and the adjustment of the co-partnership accounts, and directing a sale of the property; and under it, the property of the defendant, as heir of the alleged deceased partner, was sold; and title was claimed by the defendants below to the property by virtue of the sale under the decree.

There was no lien upon the property, by way of mortgage, judgment or attachment, to be effectuated by the decree. It was, in effect, a personal decree against the defendant, establishing a debt, and directing a sale of property. A service by publication, in such a suit as that, was entirely out of and beyond the ordinary and usual course of proceeding, either at common law or in chancery. It might well be regarded as a serious question, whether a personal judgment or decree, upon such a kind of service, and where the defendants were non-residents of the State where the decree was pronounced, could, in any event, be held valid, as a judgment binding the party thus out of the jurisdiction of the Court, even though it had the sanction of an act of the Legislature of the State where the decree was rendered, validating such a course of proceeding.

The sovereignty of the State, whether in a judicial or legislative capacity, could hardly extend beyond the limits of the State itself, and must stop, as one would suppose, at the boundary line.

Here the case is very different. A lien exists upon real estate, lying within the State, and within the jurisdiction of the Court.

It is a lien of such a character as to amount, in fact, to a legal title to the property, and subject only to the equity of redemption. The mortgagee had a right to call upon the courts of the State where the land was situated, to cut off the right of redemption, and make his title absolute, in consequence of the non-payment of the mortgage debt. This might be done by a proceeding by *scire facias*, or by bill in chancery, and in both cases, without obtaining actual personal service upon the defendants, which could not be done where they were out of the jurisdiction of the Court and beyond the limits of the State; in both cases, the law authorized the entry of a judgment or decree upon constructive service only upon the defendants. In the one case, by publication; in the other, by two successive returns of the process against the defendants not found.

This can hardly be regarded as a special or extraordinary proceeding beyond the course of the common law or of chancery. The Court of Chancery must have some power and jurisdiction to aid the complainant in enforcing his lien, and the exercise of this power cannot be defeated by the simple absence of the defendants from the State, and a statute, providing for service by publication in such a case, is in conformity with the almost universal practice in Courts of Chancery both in this country and in England.

The right of the court to proceed and adjudicate rests, not upon actual service, upon the defendannts, although notice by publication is required, but upon the situation of the property, relative to which judicial interposition is prayed for within the jurisdiction of the court.

The proceeding is, in its nature, rather a proceeding *in rem* than *in personam*, and the rules applicable to a proceeding *in rem* govern and control the case. On the con-

trary, a judgment *in personam* against a party not brought before the court or amenable to its jurisdiction, but beyond the limits of the State, is a proceeding which strikes us at first blush as unreasonable and unjust, and entirely contrary to the established course of judicial proceedings, and of doubtful validity even by the aid of a legislative act. It is unusual and extraordinary, and there is great reason in saying that an exact and literal conformity to the statute authorizing such a proceeding should be strictly followed to make it valid, if it be possible that it can be sustained at all.

Again, in the case of *Galpin* v. *Page*, the Supreme Court of California, before whom the proceeding in that case was brought in review on appeal, held a decree founded on the constructive service void, on the ground that such constructive service was not in conformity with the statute in that case and was therefore void. Upon such a state of facts shown in the case of *Galpin* v. *Page*, it is difficult to see how the court could have decided otherwise than it did, and there is nothing in the case itself, and in the facts and character of it, or in any expression, ~~and~~ used by the court in its opinion, indicating any intention on the part of the court to overrule or qualify its previous decisions, the principle of which fully sustains the validity of the foreclosure decree in this case.

Here, too, there is no error, affirmatively appearing from the record in regard to the publication notice itself, which seems to have been made in conformity to the statute, and with the order of the court. The notice is not produced. The court cannot say what its precise form may be, and whether the full names of the defendants were ascertained and inserted in the notice or not.

The most that can be said, even if that can be said, is that the record is silent as to what the precise character of this constructive notice actually was, and this silence lets in the presumptions which the law authorizes in support of

the validity of the decree, and of the constructive service upon which it was founded.

The record, however, does go further than this, and actually shows by its recitals that publication was actually made as required by the order of the court, which must be presumed, nothing appearing to the contrary, to be in conformity to the statute authorizing it.

The Supreme Court of the State of Illinois, in several cases in support of the presumption in favor of the validity of the judgments and decrees of the Circuit Courts of the State have held, that even where a defective service of process actual or constructive, appeared in the record, that it was to be presumed that some other regular and valid service was had upon the defendants when the judgment was collaterally assailed, otherwise the court would not have pronounced the decree or found the fact of service :

Moore v. *Neil*, 39 Ill., 261.
Rivord v. *Gardner*, 39 Ill., 127.
Reddick v. *Prest. State Bank of Illionis*, 27 Ill., 147, 148.
Zimmerman v. *Phelps*, 27 Ill., 496.
Banks v. *Banks*, 31st Ill., 162.
Goudy v. *Hall*, 36 Ill., 319.
Gibson v. *Rowle*, 27 Ill., 92.
Miller v. *Handy*, 40 Ill., 448.

In the case of *Banks* v. *Banks*, 31 Ill., 162, above cited, the acknowledgment of service by the defendant, embodied in the record, was of itself insufficient to sustain the decree, but as the decree was pronounced, and contained a finding of due service, the court sustained the decree.

In the case of *Rivord* v. *Gardner*, 39 Ill., 125, above cited, the return of the sheriff on the summons did not show the date of service, and standing by itself was insufficient to show jurisdiction. The decree recited that the defendants were duly served, and the court indulged the presumption of jurisdiction in support of the decree, not-

withstanding the defectiveness of the actual service mentioned therein.

In the case of *Goudy* v. *Hall*, 36 Ill., 319, although the certificate of the printer of publication of notice, contained in the decree, was defective, the general recital of due service was held sufficient; and the court say:

"We must presume from this recital that the court "received other evidence of the date of publication."

In *Zimmerman* v. *Phelps*, 27 Ill., 496, above cited, the deputy sheriff made return of the service of process in his own name, signing himself "W. C. Stoddard, deputy sheriff," but omitting altogether the name of the sheriff. The decree contained the general recital of due service, and the court in support of the jurisdiction, presumed the death of the sheriff, and sustained the decree. In 40th Illinois, 451, notwithstanding a defective return of process, and that this same was held void, the court nevertheless, held that the general recital of service was sufficient to cure the defect. They say: "The court finds that two writs of *scire facias* "had been returned *nihil*. This is strong presumptive "evidence of that fact, to be rebutted only by the clearest "proof," and the void writ appearing in the record was held not to rebut the presumption.

In the case at bar, the court by its order, as it was authorized to do by statute, directed notice of the suit, and that the defendants were to file their answers to complainant's bill with the clerk of the court, on or before the first day of the next October term, or that said bill would be taken for confessed against the defendants to be published for three weeks successively in the Edwardsville *Spectator*, by requiring that the same notice be given as that in the case of *Daniel C. Boss* v. *John Adams and Elizabeth his wife*, which was of this character, and which contained the full names of the parties, complainants and defendants.

This order the court by its decree, finds has been complied with, and that the required notice "for the appear-

" ance of the defendante in this cause has been published " three weeks successively in the Edwardsville *Spectator*, " as required by said order," and upon this finding, and the failure to enter an appearance, or answer the bill, the court upon the proof furnished and recited in the decree pronounced a decree fixing the amount of the mortgage debt and foreclosing the equity of redemption, and directing a sale of the mortgaged premises, and giving the infant defendants " one year after they shall severally arrive to " tthe age of wenty-one years, to show cause against " this decree."

Now then, so long as the notice itself is not produced, there is nothing to rebut the presumption of law, that it was in all respects, including the names of the parties, if their insertion in the notice was necessary, in conformity with the order of the court in the premises, and of the statute in such case made, and that jurisdiction over the defendant, was duly and regularly acqu'red.

This presumption must remain at all events until expressly rebutted and overthrown by the production of the actual notice of publication, shown upon inspection to be insufficient and defective upon its face.

Instead of producing this notice, the counsel for the plaintiff undertook in the court below, and now here again undertakes to defeat the legal presumption of jurisdiction, by attempting to show by inference and conjecture, that it is highly probable from the terms of the decree and the bill of foreclosure, that the full names of the parties, defendants to the suit, were not inserted in the notice, and for this reason, and because the order of the court seems to have been published as a notice, it is insisted that the decree against the defendants in the foreclosure suit was without jurisdiction and void.

We insist this will not do. The presumption of jurisdiction cannot thus be rebutted, especially after the lapse of over fifty years from the entry of the decree, without any

attempt having been made in the meantime to set it aside, and titles to the property having been built up during this same period, upon the faith of the validity of the decree. Under these circumstances the presumption in favor of jurisdiction, must still remain.

The objection that the order, of the court instead of the notice, was published, amounts to nothing. The statute does not prescribe the form of the notice, but leaves the same to the discretion of the court, and the court adopts the order of the court itself, as the best form of notice.

It sufficiently apprises the defendants of the matter, and that they are required to appear and answer the bill, and fully accomplishes the object contemplated by the statute, and answers in every respect its requirements, and hence is sufficient, and is fully sustained by the doctrine of the Supreme court of the State of Illinois, as to the sufficiency of such notices, as settled in the cases which have already been referred to.

The objection that the decree does not describe the land in controversy, is not sustainable, for the reason that it is wholly unnecessary that a formal description of the land should be inserted in the decree.

The land in question was embraeed within one of the mortgages included in the foreclosure bill, and is also to be found in the deed of Starr, the commissioner making the sale to Cabanne, the mortgagee, which was confirmed by the order of the court. There can be no mistake therefore, as to the fact that the foreclosure proceedings and decree embraced the land in controversy.

It is a well settled rule that reference may be had to different portions of the record to supply omissions and defects in other portions of the same record, and to sustain jurisdiction when it is challenged, as the following authorities will show :

Hess v. *Voss*, 52 Ill., 477.

Shute v. *Chicago & Milwaukee R. R. Co.*, 26 Ill., 437.

Galena & Chicago Union R. R. Co. v. *Pound*, 22 Ill., 414.

Lowe v. *Chicago & Galena Union R. R. Co.*, 18 Ill., 325.

Young v. *Lorain*, 11 Ill., 624.

In the case of the *Galena & Chicago Union R. R. Co.* v. *Pound*, 22 Ill., 414, the Court held the most general and indefinite recital of service sufficient to give jurisdiction, and that they would not inquire, collaterally, into the sufficiency of the specific mode of service, in the following language :

" The service of a proper notice in this case, was *in* " *pais*, to be proved the same as any other fact. The Court " heard the proof of the service of such a notice, and found " and adjudged that notices had been served on the sev- " eral owners, described in said petition, by affidavits, " shown, &c., that affidavit was a part of the record, and " if it did not contain sufficient evidence of the fact thus " found to be true, that would have been sufficient to have " reversed the order in a direct proceeding, but the Court " could not look into it, nor pass upon its sufficiency, in " any collateral proceeding."

The description of the land contained in the mortgage and in the commissioner's deed, introduced in evidence, is amply sufficient for all intents and purposes, as though the same had been inserted (contrary to the usual practice) at large in the decree.

Nor can it be successfully insisted that the mortgages introduced in evidence, one of which embraced the land in question in this case, and the other offered for the purpose of identity and in confirmation and support of the decree of foreclosure, were not embraced in these proceedings. The circumstances of identity between the

mortgages embraced in the decree and forclosure proceedings, are too numerous to leave any doubt on this point.

In the first place, there is no evidence that the mortgagor, William M. O'Hara, ever executed any other mortgages besides these two mortgages in question, introduced in evidence, upon the sixty-six quarter sections of land embraced in said mortgages. There being fifty quarter sections in the one mortgage, and sixteen quarter sections in the other.

The presumption, from this fact alone, in the absence of any other proof, would be that these were the mortgages embraced within the foreclosure proceedings and decree.

In the second place, the parties, mortgagor and mortgagee, are the same.

In the third place, the number of the mortgages is the same; there being two mortgages spoken of in the decree of foreclosure, and two mortgages introduced in evidence.

Fourth. The number of quarter sections of land contained in the mortgages introduced in evidence corresponds with the number of quarter sections mentioned in the decree as covered by the mortgages, being sixty-six quarter sections.

Fifth. The date of the notes which the mortgages were given to secure, stated in the bill introduced in evidence on the part of the plaintiff, and appearing from the foreclosure proceedings, corresponds with the date of the notes mentioned in the mortgages introduced in evidence.

Sixth. There is a correspondence in the number of the notes, there being three notes mentioned in the mortgages, and three notes mentioned in the decree, secured by the mortgages therein mentioned.

Seventh. The amount due upon the mortgages and promissory notes they were given to secure, including the accrued interest stated in the decree, corresponds with the amount of the indebtedness secured by the mortgages and promissory notes therein mentioned.

These various circumstances of identity prove, almost to a demonstration, that the mortgages introduced in evidence were the mortgages referred to in the bill of foreclosure, and which are therein stated to be "in the custody "of the complainant, and ready to be produced as this "Honorable Court shall direct."

There being no evidence that William M. O'Hara ever executed to John P. Cabanne any other mortgages besides the two mortgages in question, upon the sixty-six quarter sections embraced in said mortgages, or upon any portion of the land therein described, all these various concurring circumstances of identity come into aid, and strengthen and make conclusive the presumption that these mortgages introduced in evidence were the mortgages, and none other, embraced in the foreclosure proceedings and decree.

And when the Commissioner, appointed by the Court to sell and convey the land, executes to the mortgagee and purchaser a deed of the same premises described in the mortgages, and this deed is confirmed by the Court, and the acknowledgment ordered to be certified, and it is subsequently duly recorded, and has remained upon record for about forty years, the mortgages having also remained upon record for more than fifty years, and the foreclosure record showing the foreclosure of these mortgages therein mentioned, in the Circuit Court of Pike County, as long ago as 1823, and title to sixty-six quarter sections of land being derived thereunder, and held and claimed for nearly fifty years without controversy or dispute, and without the interposition of any adverse claim on the part of the mortgagors' heirs, every presumption in favor of the correctness and validity of this decree, and of the identity of the property affected thereby, with that described in the mortgages referred to, which could reasonably be supposed to exist after such a lapse of time, seems, by this proof, to be fully established.

IV.

The mortgage from William M. O'Hara to John P. Cabanne, covering the sixteen quarter sections therein mentioned, dated the 13th day of April, 1821, but given to secure the same indebtedness secured by the other mortgage contracted in 1820, being the sum of $5,093.34, secured by three promissory notes for the sum of $1,697.78 each, was properly received in evidence.

It was executed and acknowledged in the same way as the first mortgage, and was objected to upon the same general grounds, to which was added the additional objection: "that it was immaterial, the land in controversy "not being described in it."

The first objection we have already considered in discussing the admissibility of the first mortgage.

The other objection is of no avail, because the mortgage was clearly admissible for the only purpose for which it was offered, namely, for the purpose of identifying the mortgages embraced in the proceedings in the decree of foreclosure, and of confirming the validity of said decree, and its sufficiency both as to the parties and property embraced in it.

It was offered for the purpose of meeting the objections taken to the decree and proceedings in the foreclosure suit, made by the counsel for the plaintiff, and for this purpose was clearly admissible.

If, however, it is to be regarded as superfluous and to have been unnecessarily introduced in evidence, then its introduction could not, by any possibility, have worked any legal injury to the plaintiff, and can constitute no ground whatever for interfering with the judgment below.

V.

If we are right in the views heretofore expressed with reference to the points raised upon the trial, there was no

error committed by the judge in his charge to the jury, and in reference to introduction of evidence.

The facts adverted to by the court, in his charge, and proved upon the trial, fully rebut any common law or statutory presumption of payment arising from the lapse of twenty years after the mortgage became due.

In fact much less evidence than was offered was sufficient for this purpose.

The Supreme Court of Connecticut, in the 6th of Connecticut, 175, speaking of this presumption of payment after twenty years, say :

" This presumption may be like other presumptions, re-
" butted by circumstances. One of these circumstances is
" a residence abroad during the twenty years."

As the defendant cannot be sued, when absent from the State, no presumption can arise from any supposed laches, or neglect to prosecute the claim.

In the case at bar, the defendants in the mortgage foreclosure, the children of the mortgagor were absent from the State at the time the mortgage fell due, and continuously thereafter until the commencement of this suit.

That fact alone is sufficient to rebut the presumption of payment.

The fact of possession is another important element affecting the presumption as to payment.

Say the Supreme Court of Missouri, in the 18th of Missouri, 530, above cited :

" Where a mortgagor remains in possession of the prop-
" erty for more than twenty years without evidence of the
" acknowledged subsistence of the debt, the debt is pre-
" sumed to be satisfied. When the mortgagee is in pos-
" session, claiming as owner for more than twenty years,
" the equity of redemption is presumed to be extinguished."

In 20th Missouri, 488, above cited, the Court say :

" After twenty years' possession by the mortgagee, the

" burden is on the mortgagor to show that such length of " possession does not bar a right of redemption."

Again :

" Neither party was in possession ; the land was wild " and uncultivated. In such case the most natural pre- " sumption would be that things continued as they were " at the beginning."

Accordingly, in this case the lapse of thirty years was held no bar to the entry by the mortgagee, as neither party had been in possession.

The same doctrine, as to the presumption of payment on the one hand, after a lapse of twenty years, and of the extinguishment of the equity of redemption on the other hand, is laid down by this court in the case of *Brobst* v. *Brock*, 10th Wallace, 519, 534, and 535.

It was there held that mere absence from the State, of the mortgagor and his heirs, was " quite enough to repel " any presumption of payment arising from the lapse of " time."

In that case there was an attempted foreclosure of the mortgage, and the validity of the proceedings for foreclosure was challenged.

The court, without deciding whether the proceedings were valid or not, held that the proceedings, whether regular or irregular, and whether valid or void, as to the mortgagor, were sufficient to vest the purchaser at the foreclosure sale with the title of the mortgagee; after reaching this conclusion, on page 534, the Court say :

" The principal defendant, Brock, consequently is clothed " with the rights of a mortgagee; he is protected by the " legal title, even though it be conceded that the equity of " redemption is still in existence. From 1821 to 1861, the " date of John Brobst's death, and indeed until 1865, when " this suit was brought, no claim for redemption was ever " asserted. As a general rule, a mortgagor, after his mort- " gagee has been in possession for twenty years, cannot

" be heard in advancing a claim to redeem. As was said " in the court below, it is presumed he has released his " equity. A chancellor will not entertain stale claims. " It is true that in most cases where this doctrine has been " avowed, the mortgagee has been in continued, actual " occupancy, having not merely a right, but a *pedis pos-* " *sessionem*. But the cases are not rested upon that ground, " nor is it easy to see how that can make any difference in " the rule, when the mortgagor is out of possession, and " knows, or is bound to know, that a right is asserted " against him. The refusal of a court of equity to inter- " fere, is, because of the laches of the holder of the equit- " able right and a sleep of forty years, such as there was " in this case; may well raise every presumption against " a claim merely equitable. All such rights are imperfect, " and hence they must be asserted with vigilance."

This Court accordingly held in that case, that the purchaser under the mortgage foreclosure, even though the proceedings were insufficient to divest the equity of redemption, could not be ousted by the mortgagor or his heirs, and even where it was claimed that the mortgage was paid, the remedy of the mortgagor was by a bill in equity, instead of an action of ejectment.

This also was held by the Supreme Court of Massachusetts, in the case of *Hill* v. *Payson*, 3d Mass., 559, 560; and in the case of *Parsons* v. *Welles*, 17 Mass., 419.

This reasoning applies with great force to the case at bar, and fully justifies the charge of the Judge on this point.

The foreclosure decree introduced in evidence in this case, was obtained on the 7th day of October, 1822, and time, by the terms of the decree, was given to the infant defendants to show cause against the decree, for one year after they should severally arrive at the age of twenty-one years. For fifty years after the entry of this decree, no attempt was ever made by the defendants, the heirs of the

mortgagor, or any person holding under them, to set aside these proceedings, or open the decree, and the decree remains to-day in full force and effect, and just as operative as on the day on which it was pronounced. Such facts ought to establish an estoppel by acquiescence.

Kenyon v. *Struck*, 52 Ill., 386.

At all events, these public proceedings in a court of justice and of general jurisdiction, for the enforcement of this mortgage; the defendants' allowing judgment to go against them by default, and never interfering with the decree, but ever since remaining absent from the State and apparently neglecting all attention to this mortgage, or to the property covered by it, making no attempt to gain possession of the land, but allowing it to be held under the adverse title obtained under the decree, and possession thereof to be transferred to the parties holding such adverse title, and such possession to remain undisturbed for a long series of years, all presumption of payment of the mortgage is conclusively rebutted, and the presumption on the other hand is conclusively established in favor of the title claimed under the decree and in favor of the extinguishment of the equity of redemption.

In one sense, it is true a presumption of payment of this mortgage may be indulged as not inconsistent with the foregoing facts and circumstances. It may be reasonably presumed, and doubtless should be presumed upon such a state of proof, that the mortgage debt was discharged by a sale and conveyance of the mortgaged property to the mortgagee or purchaser in satisfaction of the debt.

A presumption in favor of the release of the equity of redemption, and in favor of a general conveyance of title is frequently established by circumstances, such as possession in pursuance of an assumed sale and claim of title, without the production of title deeds expressly showing a transfer of the title.

Cowan & Hill's notes to Phillips' Evidence,

Vol. 1, page 459.
1st Vol. Phillips' Evidence, 560 marginal paging, 664, 666, 669, 671, and cases cited.
6 Harr. & John., 336.
26 N. H., 55.
Springstein v. *Schermerhorn*, 12 John., 357.
Parks v. *Jackson*, 11 Wend., 455, 456.
1 Caine's Cases, 1 to 18.
Valentine v. *Piper*, 22 Pick., 85.
White v. *Loring*, 24 Pick., 322.
Jackson v. *Woolsey*, 11 John., 456.
Gray v. *Gardner*, 3 Mass., 401.

The ruling of the court as to the validity of the decree itself was, as we have already endeavored to show, correct. But whether this decree was, as the court held, sufficient to extingush the equity of redemption of the heirs of Wm. M. O'Hara, or not, may be regarded as immaterial, if the defendants were entitled to prevail, as we insist they were, upon the ground that they occupied the position of mortgagees in possession, and as such, could not be ousted by the heirs of the mortgagor.

As to the proposition of the Judge, that the execution of a deed by a portion of the heirs-at-law of John P. Cabanne, constituted a valid defense for the defendant to all the land in controversy, the doctrine of the court is sustainable upon two grounds. 1st. The heirs of Cabanne, or their grantees, would be tenants in common of the premises in question, and one or more ot said heirs or grantees, in actual possession of the premises, would not be liable to an action of ejectment, even at the instance of his co-tenants, merely because of the occupation of the whole of the premises by the tenant or tenants in possession. Nothing short of an absolute denial of the title ot the co-tenant, and repudiation thereof, and claim of possession adversely thereto, would be sufficient to sustain an

action of ejectment by the co-tenant against the tenant in possession.

The possession of one co-tenant is the possession of the whole, and such tenant may lawfully occupy the whole premises, so long as he is guilty of no wrongful act towards his co-tenants, or no denial of their title.

The tenant in possession has a right to the absolute and exclusive possession of the premises against all the world except his co-tenant or co-tenants.

No one has a right to assail his possession, or eject him from the premises, except his co-tenant, and he only where the title of the co-tenant is denied, and only for his undivided share.

No partition of the property having been made between the tenants, any tenant entering has a lawful possession of the *entire* premises, and cannot be ousted at the instance of a third party whose title is subordinate, and not paramount to, that under which the possession is held.

Edwards v. *Bishop*, 4 Comstock's N. Y. Rep., 61.

Valentine v. *Northrop*, 12 Wend., 495.

2nd. The declaration in this case is for the entire premises, and not for an undivided portion thereof. A plaintiff cannot declare for the whole premises, and rightfully recover for an undivided share. There being no count in the plaintiff's declaration for an undivided share, he was not entitled to a verdict therefor, even though the proof would justify such a verdict upon a proper declaration claiming the specific undivided share to which the plaintiff by his proof might show himself entitled.

The act of Congress adopted the State practice, repealing all existing rules inconsistent therewith, and under the Illinois act in existence *when this suit was commenced*, an undivided share could not be recovered under a declaration claiming the whole.

The State statute of 1872 does not apply to suits commenced, as this case was commenced, prior to its passage.

Murphy v. *Orr*, 32 Ill., 489.
Disninger v. *McConnel*, 41 Ill., 288.
Clark v. *Thompson*, 47 Ill., 25.
Hardin v. *Kirk*, 49 Ill., 153.

The exception taken to the charge upon the ground that the mortgagee does not hold the legal title, and is not entitled, as the legal owner, to the possession of the premises, cannot be sustained. Whatever may be the provisions of the law in other States, where the relation of mortgagee and mortgagor is regulated by statute, and the mortgagee is prohibited from bringing an action of ejectment against the mortgagor, no such statutory regulations exist in the State of Illinois; but the Supreme Court of this State has repeatedly held, that the mortgagee holds the legal title, and that he may maintain an action of ejectment against the mortgagor; and the common law rule on this subject prevails in the State of Illinois, not qualified or abridged in any way by statute.

Van Sant v. *Ullman*, 23 Ill., 33.
Nelson v. *Pinager*, 30 Ill., 473, 481.
Carroll v. *Ballance*, 26 Ill., 9 and 17.

In the last case cited, the court say in accordance with the common law rule which prevails in Illinois: "That as "an incident to this ownership in the mortgagee, he can "enter before condition broken or maintain ejectment. He "is considered the owner of the fee, having the *jus in re* as "well as *ad rem*, and being so, is entitled to all the rights "and remedies which the law gives to such an owner."

The presumption of payment, claimed by the counsel for the plaintiff to arise from the settlement of the estate of William M. O'Hara, in Missouri, of the mortgage debt, was properly repudiated by the court in his charge to the jury.

1st. For the reason that there was no transcript fur-

nished of the proceedings of the Probate Court in Missouri, and no evidence as to the settlement of the estate of Wm. M. O'Hara in that court, and no definite request was made of the court, purporting to be based on any evidence in the case, and properly restricted thereby.

And in the second place, no general presumption of payment prejudicial to the claim of the defendants could arise, for if there was any presumption as to payment, under all the proof in the case, it was a presumption that the debt was paid by the foreclosure and sale of the mortgaged property, acquiesced in by the heirs of O'Hara.

And in the third place, Cabanne, the mortgagee, was not bound to prove up his case in the Probate Court of Missouri, but had a right to pursue his remedy in Illinois, against the mortgaged property, and there could be no legal presumption against him, that his debt was paid, because not presented for probate in Missouri. This was especially so in the light of all the other proof, rebutting any presumption of payment, which the proposition of plaintiff's counsel virtually ignored.

The foreclosure proceedings, whether regular or not, were proper to be considered in connection with the other facts established, to show that there was no laches on the part of the mortgagee in attempting to collect the debt in the absence of the defendants from the State, from the mortgaged property, and to rebut and overthrow any presumption of payment arising from lapse of time, which under other circumstances might arise; and there was no error in the view taken by the court on this point.

The entire charge was in exact accordance with the doctrine of this court as laid down in the case of *Brobst* v. *Brock*, already referred to, 10th Wallace, 519, and from the facts proved, it is obvious that the plaintiff was not entitled to prevail in the suit below, and as was said by this Court, in the case last cited, so it may be said here, that: "Even if technical error has been committed, it would be

" idle to reverse the judgment, and send the case back for " a new trial, if it be certain that the plaintiff cannot re- " cover in the action."

No substantial error was committed, affecting the merits, prejudicial to any just right on the part of the plaintiff, and therefore the judgment below should be affirmed.

VI.

The action was barred by the Statute of Limitations. The plea of not guilty, is the only plea allowed by the statute in ejectment, and the defense upon the Statute of Limitations, as well a every other defence, is admissible under this plea.

Since preparing the foregoing brief, our attention has been called to the case of *Castner* v. *Walrod*, just decided by the Supreme Court of Illinois, which seems to be decisive of this case upon the Statute of Limitations of the State ; and according to the rule laid down in that case, we submit, as the last point in this case, that the Statute of Limitations, is an absolute bar to the plaintiff's action.

It has heretofore been assumed, that the coverture of the plaintiff's grantor, created a disability which brought her and her grantee within the exception of the statute.

The case of *Castner* v. *Walrod*, holds however, that the act of 1861, of the Legislature of Illinois, relative to married women, removes the disability, and that a married woman may maintain an action in her own name to recover her real estate.

The court further held, that where the life estate of the husband is barred by limitation, the estate is virtually extinguished, and as effectually for all practical purposes, as though the husband were dead ; and therefore, that the married woman under such circumstances, can maintain an action as entitled to the reversion to recover the land, although the life estate of the husband is not extin-

guished in any other way, than by the operation of the Statute of Limitations, and that the act of 1861 virtually repeals or modifies that portion of the previous statute prescribing the seven years bar which contains the exception in favor of married women under disability.

As the action in this case was barred against the husband of Mrs. Helen O'Hara Harrell, long prior to his death, and as early as 1864, as appears by the stipulation on page 20 of the printed record, showing possession by actual residece upon the land, and payment of taxes for 15 years prior to filing said stipulation, and ever since the month of December, 1857, the seven years bar was complete against the husband in December, 1864, and his life estate by the operation of the statute became extinguished, and the right of action on the part of Mrs. O'Hara Harrell to recover her reversionary interest then became complete, and the statute then commenced to run against her right, and the seven years bar would become complete against her in December, 1871, prior to the commencement of this suit, the declaration being filed, on the 20th of March, 1872, alleging a wrongful entry by the defendant upon the premises, and ejection of the plaintiff therefrom in January, 1872. The Statutes of Limitation referred to, are as follows, viz :

"§ 2. That every real possessory, ancestral or mixed "action, or writ of right, brought for the recovery of any "lands, tenements or hereditaments of which any person "may be possessed by actual residence thereon, having "a connected title in law or equity, deducible of record from "this State or the United States, or from any public officer "or other person authorized by the laws of the State to "sell such land for the non-payment of taxes, or from any "sheriff, marshal or other person authorized to sell such "land on execution or under any order, judgment or decree "of any court of record, shall be brought within seven

" years next after possession being taken as aforesaid.
* * * * * * * *
" And provided also, that in all the foregoing cases in this
" act mentioned, where the person who shall have right of
" entry, title or cause of action is or shall be at the time
" possession is taken as aforesaid, under the age of twenty-
" one years, insane, imprisoned, *femme covert*, out of the
" limits of the United States, and in the employment of
" this State, or the United States, such person may make
" such entry or institute such action within the time herein
" limited, after the several disabilities herein enumerated,
" shall cease to exist." Approved January 17, 1835.

" Be it enacted by the people of the State of Illinois,
" represented in the General Assembly, that, hereafter,
" every person in the actual possession of lands or tenements,
" under claim and color of title made in good faith, and
" who shall, for seven successive years after the passage
" of this act, continue in such possession, and shall also,
" during said time, pay all taxes legally assessed on such
" land or tenements, shall be held adjudged to be the legal
" owner of said land or tenements, to the extent, and ac-
" cording to the purport of his or her paper title. All per-
" sons holding under such possession, by purchase, de-
" vise, or descent, before said seven years shall have ex-
" pired, and who shall continue such possession and con-
" tinue to pay the taxes as aforesaid, so as to complete the
" possession and payment of taxes for the term aforesaid,
" shall be entitled to the benefit of this section."

Section 3d. " The above sections of this act shall not
" extend to land or tenements, when there shall be an ad-
" verse title to such land or tenements, and the holder of
" such adverse title is under the age of twenty-one years,
" insane, imprisoned, *femme covert*, out of the limits of the
" United States, or in the employment of the United States
" or of this State. Provided, such person shall commence
" an action to recover such land or tenements so possessed,

" as aforesaid, within three years after the several disabili-
" ties herein enumerated shall cease to exist, and shall
" prosecute such action to judgment, or, in case of vacant
" and unoccupied land, shall, within the time last aforesaid,
" pay to the person or persons who have paid the same,
" all the taxes, with interest thereon at the rate of twelve
" per cent. per annum, that have been paid on said vacant
" and unimproved land."

Approved March 2, 1839.

From an inspection of these statutes, taken in connection with the construction put upon them by the decision of the Supreme Court of Illinois, just referred to, and upon the effect of the statute of 1861, there would seem to be no doubt that the action was barred prior to January, 1872, and, hence, prior to the commencement of this suit.

This decision, it is true, may seem to be inconsistent with some prior decisions of the same court, but, being the last opinion of the court delivered on that subject, it must be regarded as controlling and decisive upon the points decided.

These acts pertaining to the rights of married women have repeatedly been before the Supreme Court of the State, and have received a construction by no means uniform.

Prior to the decision of *Martin* v. *Robson*, (Chicago Legal News, vol. 5. page 304,) in which the opinion of the court was delivered by Justice THORNTON, the rule of construction seems to have been a strict one, and the common law was held to prevail, except so far as it was, in express terms, changed by the statute. Justice THORNTON'S opinion inaugurated a new departure upon this question, and held that the statutes touching married women had effected a radical change in their rights, and that man and wife were, upon the true theory of the statute, virtually, two separate persons, and that the unity of interest existing under the common law was effectually destroyed,

and that she could maintain an action for her property in her own name.

This last decision has simply carried out the principle of the decision announced by Justice THORNTON to its logical conclusion. If she can sue and the disability is removed, there seems to be no good reason why the statutory limitation should not run against her.

The rule announced in *Shortall* v. *Hinckley*, 31 Ill., 219, touching the life estate of the husband, and holding that the wife, as the reversioner in fee, could not sue until this estate was exhausted, is, of course, modified by this decision, which holds the husband's life estate virtually extinguished by the statute of limitations, where the facts show that his right of entry is barred by the statute.

In the case, however, of *Shortall* v. *Hinckley*, the court was divided in opinion, Justice BREESE dissenting, and its authority has been seriously questioned ever since the opinion in that case was announced.

In fact, in the case of *Talcott* v. *Draper*, 61 Ills., 56 and 59, the case of *Shortall* v. *Hinckley* seems to have been substantially overruled, and Mr. Justice WALKER, who delivered the opinion in the case of *Shortall* v. *Hinckley*, and Chief Justice LAWRENCE, who dissented from the judgment of affirmance in the case of *Talcott* v. *Draper*, question the correctness of the decision in the first case in the following language :

" We doubt the correctness of the rule laid down in the " case of *Shortall* v. *Hinckley*, cited in the opinion of the " court, but we think there is no distinction in principle " between that case and the present, and unless that is to " be overruled, the judgment in this should be reversed."

The various examinations of this subject by the court in the several cases where these statutes have been brought in review, have finally culminated in the doctrine laid down in the case of *Castner* v. *Walrod*, above cited,

which, as we have already seen, is decisive of the case at bar.

To avoid any possibility of misconception, however, as to the effect of this decision, we produce the full copy of the opinion, as certified by the clerk of the court, which is as follows, viz :

" Opinion of the Supreme Court for the Northern Grand " Division of the State of Illinois, in a cause submitted at " a term thereof, begun and held at Ottawa, on Tuesday, " the eighth day of September, in the year of our Lord " one thousand, eight hundred, and seventy-four.

" Present, PINKNEY H. WALKER, Chief Justice; SID- " NEY BREESE, Justice; JOHN M. SCOTT, Justice; W. " K. MCALLISTER, Justice; BENJAMIN R. SHELDON, Jus- " tice; JOHN SCHOLFIELD, Justice; ALFRED M. CRAIG, " Justice."

110 " Amos Castner et al., v. James Walrod. } *Error to DeKalb.*

Opinion filed January 30, 1875.

CRAIG, J. :

" This was a bill in chancery, filed by the plaintiffs in " error in the Circuit Court of Kane County, against James " Walrod, to enforce the conveyance of a certain tract of " land, the equitable title to which, it is claimed, belongs to " them. The defendant, James Walrod, filed an answer to " the bill, to which replication was filed. A hearing of the " same was had upon the pleadings and evidence, and the " court entered a decree dismissing the bill.

" The complainants bring the record here, and urge as a " ground of reversal, that the court erred in entering a " decree dismissing their bill upon the evidence contained " in the record.

" It appears from the evidence presented in the record, " that on the 27th day of October, 1849, Amos Haskins, " the father of the complainants, purchased the land in " controversy of one Owen Hall, for the sum of $140, pay-

" able as follows ; $50 on the 1st of October, 1850, $50 in " two, and $40 in three years from the date of purchase, " with 6 per cent. interest. Haskins gave his promissory " notes for the purchase money, and received of Hall a " bond providing for a conveyance of the land upon the " payment of the notes.

" Haskins went into possession of the land under his " purchase, and made some improvements thereon. In the " summer of 1850, he lost his pocket book containing the " bond. His son, Asa Haskins, who is one of the com- " plainants, was sent in search of the bond, which he " found.

" On the 16th of October, 1850, Asa Haskins obtained " $35 or $40 of the defendant for one month, and assigned " the bond to him as security for the money. The assign- " ment indorsed on the bond was executed as follows : ' A. " Haskins by Asa Haskins.'

" Asa Haskins testified that the money obtained of defend- " ant was used in connection with some money he had to " pay the first $50 note, and the interest on the other two " notes.

" On the 4th of November, 1850, Amos Haskins died. " the money which had been loaned to the defendant, not " having been paid on the 19th of November, 1850, the " defendant presented the bond to Hall, and called for a " deed as assignee of Amos Haskins ; and upon the pay- " ment of the two deferred payments, one of $50, and the " other of $40, Hall on that date executed and delivered " to the defendant a deed for the premises, which was on " the same day placed upon the records. Immediately " after receiving a deed, James Walrod took possession of " the land under the deed, and has remained in possession " ever since, made valuable improvements, and paid all " taxes assessed upon the land.

" After Walrod had obtained the deed of Hall, he at- " tempted to induce the widow and heirs of Amos Haskins

" to convey to him. In this, however, he did not succeed, " except as to the widow and Asa, who upon a certain " consideration paid them, executed an instrument in writ- " ing on the 20th of December, 1850, conveying their in- " terest in the premises to him.

" No proceedings were instituted by the complainants to " obtain their rights in the premises, although they had " full knowledge of the manner in which the defendant " acquired the title, until the filing of this bill, on the 20th " day of January, 1869.

" While we are free to concede that if the complainants " had invoked the aid of the court in apt time, the facts " disclosed by this record develop a transaction so unfair " and inequitable in its nature, if not fraudulent in its " character, as would fully justify a court of equity to in- " terfere and decree the relief asked in the bill ; yet, where " the complainants, with a full knowledge of all the facts, " have slept upon their rights for a period of nineteen " years, and have failed to give any satisfactory reason for " the delay, and have permitted the defendant to improve " and develop the property until it has become valuable— " the case is presented in entirely a different aspect.

" The principle which must control a case of this charac- " ter has been clearly stated by Lord Camden in *Smith* v. " *Clay*, 3 Brown's Chancery Reports, in these words : " That ' a court of equity, which is never active in relief " against conscience or public convenience, has always re- " fused its aid to stale demands where the party has slept " upon his rights for a great length of time. Nothing can " call this court into activity but conscience, good faith, and " reasonable diligence. Where these are wanting, the " court is passive, and does nothing. Laches and neglect " are always discountenanced, and, therefore, from the be- " ginning of this jurisdiction, there was always a limitation " of suit in this court.'

" The principle announced in the case cited, has been so

" long sanctioned and upheld by the courts of England " and this country, and the doctrine that courts of equity " will not lend their aid to the enforcement of stale demands, " so well understood, that it seems useless to cite authorities " upon the question.

" The question has frequently arisen in this court, and " the decisions are uniform. *Burch* v. *Shaw*, 57 Ill., 25 ; " *Rugers* v. *Simons*, 55 Ill., 83 ; *Wenchell* v. *Edwards*, 57 " Ill., 45 ; *Carpenter* v. *Carpenter*, unreported.

" Where no statute of limitations exists, the length of " time which will bar a party from relief in a court of " equity, must necessarily depend, to a certain extent, upon " the facts of each case as it may arise, but when the " statute has fixed the period of limitation by which the " claim, if it had been made in a court of law, would have " been barred, courts of equity, by analogy, follow the " limitation provided by law. In *Kane County* v. *Her-* " *rington*, 50 Ill., 239, the court in discussing this question, " said : 'Where the statute of limitations would bar an " action at law, and the matter is litigated in chancery, the " latter tribunal, following the analogies of the law in such " cases, would hold the claim to be stale, and refuse the " relief sought.' See also, Angell on Limitations, Sec. 467. " *Chalmondely* v. *Clinton*, 2 Jac. and Walker., 141. But a " court of equity will often treat a lapse of a less period " than that provided in actions at law as a presumptive " bar, on the ground of discouraging stale claims, or gross " laches, or unexplained acquiescence in the assertion of an " adverse right. 2 Story Eq. Jur., Sec. 1,520.

" When the principles here announced are applied to " the facts disclosed by this record, there can be no doubt " in regard to the correctness of the decree of the Circuit " Court.

" It is shown by the record that on the 19th day of " November, 1850, the defendant obtained a deed of the " land in controversy, of Owen Hall, who, it is conceded,

" held the legal title, deducible of record from this State or " the United States.

" A short time after receiving this deed, the defendant " placed it upon record, and he and his family moved upon " the land, and from that time until the filing of the bill, he " resided upon and held actual possession of the entire " tract as a residence.

" Under the limitation laws of the State, known as the " act of 1835, continued possession by actual residence, " under a connected title in law or equity, deducible of " record from this State or the United States, for a period " of seven years, is a bar to a recovery at law.

" The bill in this case was not filed until the 20th day of " January, 1869. The bar to a recovery of the possession of " this land in an action at law was complete twelve years " before the filing of the bill.

" The limitation that bars a recovery at law, which a " court of equity should follow, we are asked to ignore " and disregard. This cannot be done, unless we should " entirely disregard principles which have been well settled " by the adjudication of this and other courts of this coun- " try as well as England, for years.

" It is, however, urged by appellants that they are not " barred by the lapse of time, because they claim the de- " fendant acquired the title he holds by fraud. If it be con- " ceded that the defendant was guilty of unfair dealing in " obtaining the title, or even of fraud, that cannot be held " a sufficient excuse for the delay and *laches* of the com- " plainants in asserting their rights in a court of equity.

" In 1850, complainants were fully cognizant of all the " facts through which the defendant procured the title to " the premises; and the delay of nineteen years before pro- " ceeding to assert or vindicate their rights in a court of " equity, is utterly unaccounted for.

" The case of *Cox* v. *Montgomery*, 36 Ill., 396, was a bill " in equity to avoid a contract for the exchange of lands,

" on the ground of fraud. The Court found the fraud " established by the proof, but in deciding the point in re- " gard to the time in which a bill should be filed, it was " said : ' Still this species of remedy must be invoked " with reasonable diligence. In a country where the value " of real estate changes so rapidly as in Illinois, it would " be clearly unwise to permit a purchaser of land to retain " it for nearly eighteen months after the discovery of the " fraud before filing his bill to rescind.

" ' This is an unreasonable delay, which a court of chan- " cery cannot tolerate. In this case, the trade was con- " summated in January, 1862, and the bill was filed Novem- " ber 27, 1863. Montgomery visited the land in Coles " County about six months after the exchange. He de- " layed filing his bill about seventeen months after the dis- " covery of the fraud.'

" Without reviewing the decisions of other courts, cited " by appellants to sustain their position, the decision cited " *supra* is conclusive of the question raised.

" It is, however, urged by the complainants, that at the " time the defendant acquired the title to the land, three of the " complainants then were, and still are, under the disability " of coverture; and as to them, the statute of limitations " did not run, nor are they concluded by *laches* or acquiesc- " ence, but are protected by and under the saving clause " of this act.

" The position taken might be regarded with some force, " were it not for an act of the Legislature that went into " force April 24, 1861, known as ' An act to protect married " women in their separate property.'

" Prior to this act, the possession of lands by actual resi- " dence, under a connected title, deducible of record, would " not constitute a bar to a recovery as against a *femme* " *covert*.

" The saving clause in the act is as follows : ' In all the " foregoing cases in which the person or persons who

" shall have right of entry or cause of action, is, are, or " shall be, at the time of such right of entry, title, or cause " of action, under the age of twenty one years, insane, or " *femme covert*, such person or persons may make such " entry, or institute such action, so that the same be done " within such time as is within the different sections of this " chapter limited after his or her becoming of full age, sane, " or *femme sole*.'

" When this saving clause of the statute became the law " of the State, a married woman could not own personal " property. Upon marriage, the personal estate of the " wife became that of the husband. If she had lands, the " husband acquired an estate during her life therein. If a " child of the marriage should be born alive, the husband, " in that event, would take an estate for life, as tenant by " the courtesy. He had the right to the possession of the " wife's lands, and the rents, issues and profits thereof. In " addition to this, she had no power to contract in regard " to her property.

" The law, in fact, divested the wife of her lands, and all " control over them; and took from her and transferred to " her husband her personal property and money.

" If the wife's lands should become occupied adversely, " she had no power to prevent the running of the statute " of limitation by the payment of taxes herself, for the " reason the law had deprived her of money and personal " property with which to pay the same. She could not " sue the occupant, and recover possession, for the law " had given the husband the right of possession.

" These were, no doubt, the main reasons that induced " the Legislature to enact the saving clause in favor of " married woman.

" The act of 1861, however, created a material change " of the common law as to the rights of married women " in regard to their own property.

" It declares that all property, both real and personal,

" belonging to any married woman, as her sole and sep-
" arate property, or which any woman hereafter mar-
" ried owns at the time of her marriage, or which any
" married woman during coverture acquires in good faith,
" from any person other than her husband, by descent,
" devise, or otherwise, together with all the rents, issues,
" increase, and profits thereof, shall, notwithstanding her
" marriage, be and remain during coverture her sole and
" separate property, under her sole control, and be held
" and possessed, and enjoyed by her, the same as though
" she was sole and unmarried ; and shall not be subject to
" the disposal, control, or interference of her husband, and
" shall be exempt from execution or attachment for the
" debts of her husband.

" Under this statute the wife is vested with the entire
" control of her lands and personal estate. If any person
" should take possession of her lands, she could bring an
" action to recover them. She has power to employ at-
" torneys to attend to her business. She can control her
" personal property, and the rents of her lands; and neces-
" sarily has the means to pay taxes. She has, in fact, the
" same ability and power to prevent one who should take
" possession of her lands from occupying under title
" deducible of record, until the possession would ripen into
" a bar, as if she were sole and unmarried.

" The reason for the enactment of the saving clause in
" the statute in favor of a *femme covert* having ceased to
" exist by the passage of the act of 1861, and the two be-
" ing so utterly inconsistent, we are therefore of opinion
" the former act has no application to cases like this.

" The only remaining question to be considered is the
" effect the act of 1861 produced upon the rights of com-
" plainants.

" The complainants were married women at the time the
" defendant moved upon the land in 1850, and they are
" still married, residing with their husbands. By the mar-

" riage, the husbands had a life estate in whatever interest " their wives had in the premises in controversy. When " the defendant had resided upon the premises, for seven " continuous years, this was a bar to a recovery in behalf " of the husbands.

" Had an action at law been brought by the husbands at " any time after 1857, the residence of the defendant under " his title would have been a complete bar to a recovery. " Their life estate, then, was in effect gone. After that time " they ceased to have any valid interest in the premises. " Practically, the life estate was destroyed. In one sense " it may be said to have an existence ; but no action could " be maintained to recover it. Its vitality was gone. It " no longer had an existence except in name.

" As was said by this court in *Hinchman* v. *Whetstone*, " 23 Ills., 185 : ' When the right of entry and the right of " ' action, are both lost, it is difficult to perceive what prac- " ' tically remains to the former owner.' So in this case. " The life estate having terminated by operation of the " statute of limitation, when the disability of coverture was " removed, then complainants were bound to bring an " action within seven years, or their title would be barred.

" In *Higgins* v. *Crosby*, 40 Ills., 257, it was said : ' It is " ' certainly true that the statute may run, and the bar be- " ' come complete against an estate for life, or for a term " ' of years ; as in such cases the right of entry is a present " ' existing right.'

" But in such cases, when the particular estate is spent, " the bar falls with that estate, and the right of entry then " accrues to the remainder—man or reversioner; and then, " and not till then, the statute begins to run against him.

" In 1858, the life estate was barred. In 1861 the dis- " ability of coverture was removed, and the statute then " commenced to run against complainants. They then " had seven years in which to institute their action to avoid " the operation of the statute of limitations, and bring them-

" selves within the saving clause of the statute. This they " failed to do ; but permitted the defendant to reside upon " the land undisturbed for more than seven years after the " passage of the act of 1861.

" We cannot do otherwise than hold that the complain- " ants are not within the saving clause of the statute.

" In any view we have been able to take of the facts " disclosed by this record, the laches of complainants are " inexcusable; and they have failed to show proper grounds " for relief. The decree of the Circuit Court will be " affirmed. AFFIRMED."

" I, CAIRO D. TRIMBLE, Clerk of the Supreme Court in " and for the Northern Grand Division of the State of " Illinois, do hereby certify that the foregoing is a true " copy of the final opinion of the said Supreme Court in " the above entitled cause of record in my office.

" IN TESTIMONY WHEREOF, I have set my hand and " affixed the seal of the said Supreme Court at Ottawa, " this sixteenth day of February, in the year of our " Lord, one thousand eight hundred and seventy-five.

" C. D. TRIMBLE,

" CLERK OF THE SUPREME COURT."

{ Seal of the Supreme Court State of Illinois. }

If this decision is the law of the State, (and it not only seems to be the last adjudication upon the questions decided, but it seems also to be the conclusion towards which the Supreme Court of the State has been steadily tending in all its more recent deliverances for some years past,) the action in this case was clearly barred by the statute of limitations, and a complete defense was established upon this ground, as well as upon the ground of paramount title in the defendants.

THOMAS G. FROST,

Attorney for Defendants in Error.

IN THE

SUPREME COURT

OF THE UNITED STATES,

NORTHERN DISTRICT OF ILLINOIS.

October ~~September~~ Term, A. D. 1875.

GEORGE A. KIBBE,
Plaintiff in Error,

—*vs.*—

SAMUEL DITTO and AMOS DUNN,
Defendants in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

POINTS AND AUTHORITIES

On the part of the Defendants in Error.

T. D. FROST,

Attorney for Defendants in Error.

CHICAGO:

Beach, Barnard & Co., Legal Printers, 98 Randolph Street.

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POINTS AND AUTHORITIES

On the part of the Defendants in Error.

I.

THE OBJECTION TO THE MORTGAGE FROM WM. M. O'HARA TO JOHN P. CABANNE CANNOT BE SUSTAINED.

1st. It was too general.

McNitt v. *Turner*, 16 Wallace, 352, 362.
Sargent v. *Kellogg*, 5 Gilman, 273, 281.
Burton v. *Bailey*, 27 Ill., 409, 410.
Conway v. *Case*, 22 Ill., 127, 139.
Davis v. *Rawson*, 26 Ill., 100, 105.
Swift v. *Whitney*, 20 Ill., 144, 145.
Russel v. *Whiteside*, 4 Scam., 11.

2d. It is untenable.

The acknowledgment is good. The curative acts of 1829 and 1847 made valid acknowledgments taken before *a notary public*. The certificate of personal knowledge of the identity of the parties making the acknowledgment was unnecessary under the laws in force when this mortgage was acknowledged.

Purple's Real Est. Statutes, 487.
Laws of 1847, Act of Feb. 22, 1847.
Carpenter v. *Dexter*, 8 Wall., 516, 426.
Ayres v. *McConnel*, 2 Scam., 307.
Logan v. *Williams*, given *infra* in full, manuscript case.

II.

THE OBJECTIONS TO THE STARR DEED ARE NOT WELL TAKEN.

1st. The objection in the court below was too general.
16 Wallace, 352, 362; and cases above cited.

2d. The acknowledgment is good under the laws and usage in force at the time it was taken.

Fail v. *Goodtitle*, Breese Rep., 201, 202, and note.
Purple's Real Est. Stat., pp. 306, 308.
Act of Sept. 17, 1807.
Logan v. *Williams*, supra.

3d. The equity of redemption was extinguished by the decree, thus securing the entire ownership to the mortgagee in whom the legal title was already vested, and the execution of a deed to the mortgagee was wholly unnecessary; and whether the deed by Starr, the commissioner, was

properly acknowledged or not is, therefore, immaterial.

Brobst v. *Brock*, 10 Wallace, 519.
Carroll v. *Balance*, 26 Ill., 15.
Nelson v. *Pinegar*, 30 Ill., 473.
Williams v. *Brunton*, 3 Gilman, 610, 622.
Fetrou v. *Merriwether*, 53 Ill., 278.
Kenyon v. *Shreck*, 52 Ill., 386.
Ralson v. *Hughes*, 13 Ill., 482.
Johnson v. *Adelman*, 35 Ill., 274.
2 Hilliard on Mortgages, p. 2.
3 Gilman, 611, 623.

4th. The facts proved authorized the presumption of an extinguishment of the equity of redemption, by a deed duly executed releasing the same.

18 Mo. Rep., 530.
1 Phillip's Ev., 560 marginal paging, 671, 558: m. p. 669; and cases cited.
6 Harris & John., 336.
26 N. H., 55.
Valentine v. *Piper*, 22 Pick., 85.
White v. *Loring*, 24 Pick., 322.
12 John., 357.
Park v. *Jackson*, 11 Wend., 455.
I Caines' Cases, 1 to 18.
Jackson v. *Woolsey*, 11 Johns., 456.
Gray v. *Gardner*, 3 Mass., 401.
1 Phillip's Ev., 664 to 666.

5th. The defendants, having succeeded to the title of the mortgagee, and thus holding the legal title to the property, are entitled to the possession, and to prevail in an action of ejectment by the mortgagor or his grantee. The remedy of the mortgagor is a bill in chancery to redeem, if the right has not been cut off by a valid foreclosure.

Brobst v. *Brock*, 10 Wall., 519.
Hill v. *Payson*, 3 Mass., 559.

Parsons v. *Wells*, 17 Mass., 419.
Hooper v. *Scheiner et al.*, 23 How., 235.
Fenn v. *Holme*, 21 How., 482.
Sheirburn v. *Cordova et al.*, 24 How., 430.
Carroll v. *Ballance*, 26 Ill., 15.
Nelson v. *Pinegar*, 30 Ill., 473.
Williams v. *Brunton*, 3 Gilman, 610–622.
Fetrou v. *Merriwether*, 53 Ill., 278.
Kenyon v. *Shreck*, 52 Ill., 386.
Ralston v. *Hughes*, 13 Ill., 482.
Johnston v. *Adelman*, 35 Ill, 274.
2 Hilliard on Mortgages, page 2.

III.

THE DECREE OF FORECLOSURE WAS VALID; THE SERVICE BY PUBLICATION WAS SUFFICIENT TO GIVE JURISDICTION. EVEN IF IRREGULAR, THE SERVICE AND NOTICE WERE NOT VOID.

Florentine v. *Barton*, 2 Wallace, 210.
Morris v. *Hogle*, 37 Ill., 155.
Thompson v. *Lever*, 8 Vesey Rep., 141.
46 Mississippi, 31.
Hynes v. *Oldham*, 37 B. Monroe Ry. Rep., 266.
Baker v. *Steerns*, 10 Abbott's Pr. Rep., 1.
Paine v. *Mooreland*, 15 Ohio, 435.
Voorhees v. *Bank of U. S.*, 10 Peters, 449.
Nations v. *Johnson*, 24 How., 195.
Grignon's Lessee v. *Astor*, 21 How., 119.
Booth v. *Rees*, 26 Ill., 48.
Dyer v. *Flint*, 21 Ill., 80.
Logan v. *Williams*, manuscript case.

The presumption of law is that proper notice was given, and proper service had by publication.

Moore v. *Neill*, 39 Ill., 261.
Ricord v. *Gardner*, 39 Ill., 127.
Reddick v. *Prest. State Bank of Illinois*, 27 Ill., 147, 148.
Zimmerman v. *Phelps*, 27 Ill., 496.
Banks v. *Banks*, 31 Ill., 162.
Goudy v. *Hall*, 36 Ill., 319.
Gibson v. *Rowle*, 27 Ill., 92.
Miller v. *Handy*, 40 Ill., 448.
Hess v. *Voss*, 52 Ill., 477.
Shute v. *Chicago & Milwaukee R. R. Co.*, 26 Ill., 437.
Galena & Chicago Union R. R. Co. v. *Pound*, 22 Ill., 414.
Lowe v. *Chicago & Galena Union R. R. Co.*, 18 Ill., 325.
Young v. *Lorain*, 11 Ill., 624.

IV.

THE MORTGAGE FROM WILLIAM M. O'HARA TO JOHN P. CABANNE, COVERING 16 QUARTER SECTIONS, GIVEN TO SECURE THE SAME DEBT AND PROMISSORY NOTES MENTIONED IN THE FIRST MORTGAGE, WHICH COVERED THE LAND IN QUESTION, WAS PROPERLY RECEIVED FOR THE PURPOSE OF *identifying the mortgages embraced in the proceedings and decree of foreclosure.*

If superfluous and unnecessary, it could not, by legal possibility, have worked any injury to the plaintiff below, and constitutes no ground for interfering with the judgment.

V.

THE CHARGE OF THE JUDGE, IN ACCORDANCE WITH THE FOREGOING PROPOSITIONS, WAS IN ALL RESPECTS CORRECT, AS THE AUTHORITIES ABOVE CITED SHOW.

The presumption of payment of the mortgage, except by a sale of the property under the decree of foreclosure, was rebutted by the facts proved.

The decree of foreclosure was valid.

The defendants below, as mortgagees in possession, even though the decree was *void*, were entitled to prevail in an action of ejectment by the mortgagor or his grantee.

The deed of a portion of the heirs of John P. Cabanne, the mortgagor of the premises to Booth Nettleton, and the transfer of this title by Nettleton to the defendants, constituted a valid defense to the action as to all the land in controversy.

1st. The heirs of Cabanne and their grantees, the defendants below, are tenants in common.

The possession of one tenant is the possession of the whole. The tenant in possession has a right to the absolute and exclusive possession of the premises against all the world, except his co-tenants.

No one has a right to assail his possession, except his co-tenant, and he only when the title of the co-tenant is denied, and only as for his undivided share.

Edwards v. *Bishop*, 4 Comstock, 61.
Valentine v. *Northrop*, 12 Wend., 495.

2d. The declaration in this case is for the entire premises, and *not* for an undivided portion thereof.

There being no count for an undivided share, the plaintiff was not entitled to a verdict for such share, even though the proof would justify such a verdict upon a

proper declaration, claiming some specific undivided share.

Murphy v. *Orr*, 32 Ill., 489.
Disninger v. *McConnel*, 41 Ill., 288.
Clark v. *Thompson*, 47 Ill., 25.
Hardin v. *Kirk*, 49 Ill., 153.

The mortgagee, in the State of Illinois, holds the legal title, and may maintain ejectment.

VanSaut v. *Ullman*, 23 Ill., 33.
Nelson v. *Pinager*, 30 Ill., 473, 481.
Carroll v. *Ballance*, 26 Ill., 9 and 17.

VI.

THE ACTION WAS BARRED BY LIMITATION.

Manuscript opinion, Castner v. *Walrod.*

VII.

The validity of the title of the defendants below, derived under the mortgage to Cabanne, decree of foreclosure and sale, and deed thereunder, and the sufficiency of the acknowledgment of the deed and mortgage, and the validity of the decree, under the statutes of Illinois, are fully settled and decided by the Supreme Court of the State of Illinois, in the manuscript case of *Logan* v. *Williams*, decided since the brief on the part of the defendants in error, was filed. The same title was involved, and the same objections were made in that case as this, and the construction given by the Supreme Court of the State to its own statutes, touching the acknowledgement of deeds and mortgages, and service of process, actual and constructive, and the validity of the decrees of the courts of the State, are as adjudications under the rule recognized by this court binding upon it; and that case in which a full copy of the opinion of the Supreme Court is given, accompanies

and follows these points and citations, and is decisive of this case.

THOS. G. FROST,
Att'y for Defendant in Error.

(57) JOHN LOGAN *vs.* JOHN H. WILLIAMS. } *Appeal from Adams.*

Opinion of the Court by Mr. Justice CRAIG.

This was an action of ejectment brought by John Logan in the circuit court of Adams county, against John H. Williams, to recover a certain quarter section of land in Adams county.

A trial was had before the court without a jury, and the issues were found in favor of the defendant, and judgment rendered against the plaintiff for costs, who brings the record here by appeal.

The appellant, for the purpose of establishing title to the premises, read, in evidence, an exemplification of the patent from the United States to Samuel Andrews, dated March 24th, 1818. A deed from Samuel Andrews to Wm. M. O'Hara, dated November 1st, 1819.

He then offers in evidence a certified copy of a mortgage from Wm. M. O'Hara and wife to John P. Cabanne, containing the land in controversy, and fifty-three other quarter sections in the military tract, dated ——— day of September, 1820, and recorded the 21st day of February, 1821. The acknowledgment was taken before a notary public in the city of St. Louis, Mo., October 3, 1820.

To the introduction of this mortgage in evidence, the appellee objected on the ground that it was not acknowledged before an officer authorized by law to take the acknowledgment.

The court sustained the objection, and excluded the mortgage.

Then appellant offered in evidence a certified copy of the proceedings of the circuit court of Pike county, in a certain cause wherein John P. Cabanne was complainant, and Susan O'Hara *et al.* were defendants, on a decree to foreclose the mortgage, which had been excluded by the court. This record the court excluded.

Appellant then offered in evidence a deed made, dated February 20th, 1823, from Henry Starr, who was a commissioner appointed by the court, in the foreclosure of the mortgage, to sell the lands to John P. Cabanne. This deed was also excluded by the court.

Appellant then read in evidence deeds by which he deduced title to the land, by mesne conveyance, from John P. Cabanne to himself.

The appellee, as is said by the record, deduced title to the land by mesne conveyance from Wm. M. O'Hara to himself.

The first question presented is whether the mortgage from O'Hara and wife to Cabanne, which the court excluded, was competent evidence.

The act of February 19th, 1819, which was in force at the time the mortgage was acknowledged, required it to be acknowledged by the grantor, or proved by one of the subscribing witnesses, before some judge of a superior court of the State, mayor or chief magistrate of a city, or before the clerk of the county, or other court of the county, where such deeds or conveyances shall be made, and certified under the common public seal of such city or county. By the terms of the act, a notary public was not empowered to take the acknowledgment, but in 1827 the legislature passed another act concerning the conveyance of real estate, and in 1829 the act of 1827 was amended.

The first section of the act of 1829, is as follows: "That "all deeds and conveyances of land, lying within this

" State, may be acknowledged or proved before either of " the following named officers: Any judge or justice of " the Supreme or District Court of the United States, any " commissioner to take acknowledgments of deeds, any " judge or justice of the Supreme, Superior, or Circuit " Court, of any of the United States or territories, any " clerk of a court of record, mayor of a city, or notary " public; but when such proof is made before a clerk, " mayor, or notary public, it shall be certified by such offi- " cer under his seal of office. All deeds and conveyances " which have been, or may be acknowledged or proved " in the manner prescribed in this section, shall be deemed " as good and valid in law as if the same had been " acknowledged or proved in the manner prescribed in " the ninth section of the act, to which this is an amend- " ment."

Purple's Real Estate Statute, 487.

The object of this statute was to cure defective acknowledgments. It was, by its express terms, retroactive in its operation.

There had no doubt been a large number of conveyances made where the acknowledgment had been taken before officers not authorized by the statute to act. To remedy the evil and cure the defects, this curative statute was no doubt passed.

After the revision of 1845, and in 1847 a similar curative statute was enacted. The very aim and objects of these acts were to validate acknowledgements which had been taken before notaries public and other officers who were not at the time empowered by the statute to act. These curative statutes should receive a liberal construction, such as will accomplish the object intended by their enactment by the legislative branch of the government. When the mischief to be remedied, and the manifest object of the statutes are kept in view, there can be no doubt that the acknowledgment was validated by the curative acts.

It is, however, urged that the acknowledgment is bad, for the reason the notary did not certify that the grantor was personally known to him to be the person whose name is subscribed to the mortgage as required by the act of 1827, and in support of this position, we are referred to case of *Adams* v. *Bishop*, 19th Ill., 395, as an authority holding the acknowledgment in form must conform to the act of 1827. The obvious answer to this, however, is that the act of 1819, in force at the time this mortgage was acknowledged, and which must control, did not require the officer to certify to the personal identity of the mortgagor. The act of 1827 contained that requirement, and the acknowledgment passed upon in case of *Adams* v. *Bishop*, *supra*, was made after the act of 1827 went into effect, and in that case the court very properly held the certificate of the officer must conform to the latter act.

The identical question here involved, arose in case of *Carpenter* v. *Dexter*, 8th Wallace, 513. There a deed was acknowledged before a justice of the peace, in 1818, who was not authorized by the laws of Illinois, at that time, to take acknowledgments. The court held the curative act of 1847 validated the acknowledgment, notwithstanding "the officer taking the acknowledgment "failed to certify the grantor was personally known to "him, as required by the act of 1827 and 1845." The construction placed upon the statute by the court was undoubtedly correct. From these views, it follows that the mortgage was properly acknowledged, and should have been admitted in evidence.

The next question arising upon the record is, whether the record of the proceedings of the circuit court of Pike county, in the case of *John P. Cabanne* v. *Susan O'Hara, and others*, was admissible in evidence. John P. Cabanne held three promissory notes, amounting in the aggregate to $5,462.20, against Wm. M. O'Hara. These notes

were secured by two mortgages executed by O'Hara and his wife, both of record in Pike county, one dated in September, 1820, containing fifty quarter sections of land, in the military tract; the other was executed April 13th, 1821, and contained sixteen quarter sections of land, situated in the military tract. At the time the mortgage was executed, Pike county contained all the land lying between the Illinois and Mississippi rivers, extending to the North boundary of the State.

John P. Cabanne filed a bill which was pending at the term 1822, of the circuit court of Pike county, to foreclose the two mortgages, from which it appears that Wm. M. O'Hara, had died; that his widow and children were non-residents. The bill was exhibited against Susan O'Hara, widow, and others, children and heirs-at-law of Wm. M. O'Hara, deceased.

Two objections are urged against the validity of the decree of sale, rendered in this case. *First:* that the court did not acquire jurisdiction of the defendants, by service of summons or publication of notice, as required by law. *Second:* That the lands are not described in the decree.

At the April term, 1822, the record shows a certain cause pending, and an order of court, as follows:

"DANIEL C. BOSS,
vs.
"JOHN ADAMS, & ELIZABETH,
"his wife. } *Complainants in Chancery.*

"It appearing to the court, that the defendants in this "cause are not inhabitants of this State, and they not having answered the complainant's bill, it is ordered by the "court, that they file their answer to said bill with the "clerk of this court, on or before the first day of the next "October term of said ———, or that said bill will be "taken as confessed against them, and it is further ordered that a copy of this order be published three weeks "successively, in the Edwardsville Spectator."

Robert Simpson v. *Susan O'Hara and others*, complainants in chancery.

John P. Cabanne v. *same defendants*, complainants in chancery.

Ordered that the same notice be given in the two last cases as in the one immediately preceding.

At the October term, 1822, the record shows the following:

"This day comes the complainant by his counsel, and it "appearing to the court that the order made at the last "term, for the appearance of the defendants in this cause, "has been published three weeks, successively, in the "Edwardsville Spectator, as required by said order, and "the defendants, not having entered their appearance "herein, or answered the bill of complaint.

"On motion of complainant's counsel, it is ordered by "the court that such bill be, and the same is hereby taken "for confessed against them."

The act of 1819, providing for service upon non-residents, in force at the time these proceedings were had, declares: That if any defendant in chancery reside out of the State, or cannot be found to be served with process of subpœna, or is absent to avoid being served therewith, public notice shall be given to the defendant, signed by the clerk, in any newspaper printed in this State, or in adjoining territory, as the court may direct; that unless he appear and file his answer by a day given him by the court, the bill shall be taken *pro confesso*.

What the form of the notice was, does not appear, nor is it material, as no form is prescribed. The nature of the notice, seems to have been left, in a great measure, to the discretion of the court. The court, by the decree, found that notice had been given as required by the order of the court, and when the question arises collaterally, as it does here, the presumption of law is, that the notice given the defendant was sufficient.

The court that rendered the decree that notice had been given as required, was a court of general jurisdiction, and the presumption of law is, the court had jurisdiction of the parties and the decree valid, until the contrary is made to appear.

It is said, the children and heirs-at-law of Wm. M. O'Hara, were not notified or brought into court by their proper names. The fact, however, does not appear from the record. The defendants to the bill were Susan O'Hara, and others, the widow and heirs-at-law of Wm. O'Hara, deceased.

At the first term of court at which the bill was pending, the court found the fact as shown by decree, that defendants were not inhabitants of the State. An order based upon this finding, was entered requiring the defendants to be notified by publication in a certain paper.

At the next term of court, it was a question for the court to determine whether notice had been given the defendant's from the proof then produced. The court heard the proof and found and adjudged that the required notice had been given. What the notice contained, the record does not disclose, but when the question arises collaterally, the legal presumption is, that the notice which the court passed upon, contained every fact necessary to give the court jurisdiction of the person of the defendants as was said in *Reddick et al.* v. *The State Bank*, 27 Ill., 145. "It is to be presumed that no court will state of record "the existence of facts which had no existence, or pass a "decree, or render a judgment, unless proof of service or "notice were actually produced. The record, therefore, "stating such, and nothing to the contrary appearing, it "should be received as evidence of their existence."

See also *Galena and Chicago Union R. R. Co.* v. *Pound*, 22d Ill., 399.

Revord v. *Gardner*, 39 Ill., 124.

Moore v. *Neil*, 39 Ill., 256.

The decree of foreclosure sought to be impeached, was entered October 7, 1822, by the terms of which the minor defendants had the right at any time within one year after they became of age, to appear and contest the decree.

Under this decree the mortgage lands have been sold, and passed into the hands of actual settlers, on the faith of the solemn adjudication of a court of general jurisdiction; purchasers have improved and rendered the lands valuable, and for more than half a century no effort has been made by the heirs of the mortgagor, or those claiming under them, to impeach the validity of the decree of sale. Under such circumstances, to permit the effect of a judicial record to be overturned, without the most cogent reasons, would in effect open a wide door to fraud and speculation, destroy all confidence in judicial sales, and remove that protection from innocent purchasers which it has been the doctrine of all courts to uphold and sustain.

In *Voorhees* v. *The Bank of the United States*, 10 Peters, 449, the court, in discussing a question of this character, said:

"That some sanction should be given to judicial pro-
"ceedings, some time limited beyond which they should
"not be questioned, some protection offered to those who
"purchase at sales by judicial process, and some definite
"rules established by which property thus acquired may
"become transmissible with security to the possessors, can-
"not be denied."

The objection that the decree does not describe the lands, is not well taken. The decree directs the sale of the mortgaged premises mentioned and described in the complainant's bill of complaint, being sixty-six quarter sections of land. By referring to the mortgages which were made a part of the bill, an accurate description of the land is found. It was not at all necessary that a formal description of the land should be inserted in the decree.

There is no uncertainty as to the land decreed to be

sold, or that was actually sold. The land in controversy is embraced in one of the mortgages described in the bill. It is contained also in the commissioner's report of sale and deed.

The mortgages and proceedings in the foreclosure of the same in the circuit court of Pike county, and the commissioner's deed which the court executed, should have been admitted in evidence, and upon the evidence introduced and offered, the judgment should have been entered in favor of appellant.

The judgment will be reversed, and the cause remanded for another trial, consistent with this opinion.

Reversed and remanded.

I, E. C. Hamburgher, clerk of said Supreme Court, do hereby certify the foregoing to be a true copy of the opinion of said court, in said cause, as the same appears from the records and files of my office.

In testimony whereof, I hereunto set my hand and the seal of said court, at Springfield, this thirty-first day of August, 187 .

E. C. HAMBURGHER,

Clerk Supreme Court.

No. ..... *Agenda No.* .....

UNITED STATES

SUPREME COURT,

Northern District of Illinois.

October

~~SEPTEMBER~~ TERM, A. D. 187

In Error to the Circuit Court of the United States for the Northern District of Illinois.

GEORGE A. KIBBE, *Plaintiff in Error,*

—vs.—

SAMUEL DITTO and AMOS DUNN,
Defendants in Error.

POINTS and AUTHORITIES
On the part of Defendants in Error.

Filed 187

.....
Clerk.

T. G. FROST,
Att'y for Defendants

Beach, Barnard & Co., Printers, 98 Randolph St., Chicago.

IN THE

UNITED STATES SUPREME COURT.

OCTOBER TERM, A. D. 1875.

GEORGE A. KIBBE,
v.
SAMUEL DITTO AND AMOS DUNN.

Error to the Circuit Court of the United States for the Northern District of Illinois.

REPLY FOR PLAINTIFF IN ERROR.

W. C. GOUDY,
Att'y for Plaintiff in Error.

CHICAGO:
BULLETIN PRINTING COMPANY, 132, 134 & 136 Monroe St., cor. Clark.
1875.

UNITED STATES SUPREME COURT.

OCTOBER TERM, A. D. 1875.

GEORGE A. KIBBE,
vs.
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In Error to the Circuit Court of the United States for the Northern District of Illinois.

REPLY FOR PLAINTIFF IN ERROR.

I.

STATUTE OF LIMITATIONS.

The counsel for the defendants in error insists that the action of plaintiff below was barred by the statute of limitations, and prints in his brief a copy of the opinion of the Supreme court of Illinois, in the case of *Castner v. Walrod.*

By reference to the record, it will be seen that no question in regard to the limitation of the action was presented in the court below. It was then conceded that the action was not barred, because the plaintiff's grantor had been a married woman until December, 1871, and the action was brought within less than three years from that time, which brought it within the saving clause of the limitation law. The only ob-

ject in presenting it now for the consideration of this court is, to set out that a reversal and a re-trial would not produce a different result. In answer, I say, that the decision of *Castner v. Walrod* is not acknowledged law in the State of Illinois. It was delivered January 30, 1875, and since that time, at the suggestion of the court itself, a petition for a re-hearing was allowed after the period allowed for that purpose had expired. And that petition is now pending before the court.

When this opinion was filed, it produced great surprise on the bench and at the bar. It has been ascertained that that part of the opinion which construes the limitation law was objected to by a portion of the court when the opinion was read in council, and it was supposed that it had been eliminated, but in some way it found its way upon the files as originally written. There can be no reasonable doubt in regard to the action of the court on the rehearing. The opinion will certainly be vacated, and the opinion placed upon the other cases cited. For it will be seen that this part of the opinion is not necessary to sustain the conclusion of the court.

It has been the settled law of Illinois for more than a quarter of a century, that under the limitation law of that State, where the fee was vested in the wife, the husband had a life estate; that the wife's estate did not vest so as to give her a right of possession until the death of her husband. Based upon this principle, the conclusion was drawn, that, although the estate of the husband for life might be barred, that of the wife could not be till the conditions of the statute occurred after her estate had commenced. There is a proviso that in such cases the wife shall bring her action for the recovery of the land within three years after her disability has ceased to exist. This principle has been established not only

by the Supreme court of Illinois, but has been settled by this court.

Gregg v. Tesson, 1 Black. 150.
Shortall v. Hinckley, 31 Ill. 219.
Kibbe v. Williams, 58 Ill. 30.

Since these decisions were made they have been the rule of property in Illinois. A suit was brought by the plaintiff for this identical tract of land within seven years of the time the act of 1861 took effect, in the United States Circuit court, at Chicago, during the time that the husband of Mrs. Harrell was living; and that court, following the cases before cited, held that the action was barred, and that none could be maintained till the death of the husband. Relying upon this decision, the plaintiff awaited that event, and commenced the present suit immediately thereafter.

Since the case of *Castner v. Walrod* was decided, the opinion in that case has been passed upon by the Federal court in Illinois, and that court declined to follow it in a case where the facts were exactly the same.

For these reasons it would be clearly unjust to affirm the judgment below, because of this point, now raised for the first time, under the statute of limitations. If the judgment is reversed and the cause remanded for a new trial, the parties will have an opportunity to be heard upon that point, and it is believed that no such opinion will be in force at that time.

II.

THE DEFENCE UNDER THE MORTGAGE ON THE HYPOTHESIS THAT IT HAS NOT BEEN FORECLOSED.

The counsel for the defendants answered the proposition that the deed, by five-sevenths of the heirs of the mortgagee,

was a defence as to the entire tract, by two propositions: First, that the possession by a tenant in common is a possession of the entire premises for himself and his co-tenants, and, that an action of ejectment cannot be maintained for an undivided part of the premises by any person except the co-tenant, and by him only, where the title is denied. Second, that under the declaration, in this case, an undivided share could not be recovered.

It may be, that in some cases, the possession of one co-tenant is the possession for himself and the others, but the principle does not govern this case. The plaintiff proved title, and a right to recover the whole tract; the defendant then undertook to show a better title through O'Hara, one of the persons in the chain of plaintiff's title. In undertaking to accomplish this result, it appeared from the evidence, that the defendants had possession in 1857, under a deed from Harding & Matthews, purporting to convey the entire tract of land. They remained in possession, claiming to be the absolute owners of the whole tract of land till 1861, when they received the quit-claim deed from Nettleton, purporting to convey the entire tract, who was the grantee of five-sevenths of the heirs of Cabanne, the mortgagee. The direct question is, Were the defendants, at the time suit was brought, in 1872, holding possession for themselves, and also for the remainder of the heirs of Cabanne, as tenants in common? It is impossible to maintain such a proposition. These defendants claim to be the owners of the whole tract, derived from one-seventh of the heirs, and received the release under the mortgage to strengthen the title they already had. It cannot be supposed that they waived the ownership, or claim to ownership, in favor of the other heirs of the mortgagee; but they would assert

title to the whole, and adversely to the heirs of Cabanne and the whole world.

The case of *Goowey v. Urig*, 18 Ill. 238, is exactly in point. There the plaintiff deduced title in fee. The defendants undertook to show a title under a limitation law, and, in doing so, proved the claim or color of title in four persons as tenants in common; and then produced a deed to himself from one of the four, purporting to convey the whole tract of land, and then proved the requisite possession under such deed. The court held that in such case there was no possession for the tenants in common, but only by the grantee, one of them, for himself, and to the extent of his own interest.

In the case at bar, the plaintiff proved a right to recover all the land. The defendants made no successful claim as against the plaintiff under the deed from Harding & Matthews; resting upon that the plaintiff would have been entitled to a verdict for all of the land; and the defendants went further and undertook to show that they had title of five-sevenths of the land from another source, and therefore the plaintiff was entitled to recover the remaining two-sevenths because there was a failure to show any title to that portion of the land. It is to be remembered in this case what we have already asserted, that this is not a case of a mortgage where there was an entry by the person holding the indebtedness as a method of foreclosure, but where the mortgagee asserted title under the mortgage precisely as if it was an absolute deed.

In regard to the second point, I answer, it is not true that the plaintiff could not recover undivided shares under a declaration which claimed the whole. This declaration was

filed March 20, 1872. On the same day the legislature of Illinois passed an act which provided, in the act regulating the practice in the action of ejectment (Sec 12): "That the premises, so claimed, shall be described in such declaration with convenient certainty, so that, from such description, possession of the premises may be delivered. If such plaintiff claims an undivided share or interest in any premises he shall state the same particularly in such declaration, but the plaintiff, in any case, may recover such part, share or interest in the premises as he shall appear, on the trial, to be entitled to." This act took effect July 1, 1872.

It is true that, prior to the passage of the above act, it was necessary, in Illinois, to insert a count in the declaration claiming an undivided interest in order to recover such a share, but that rule was confined to the State courts and never did apply to the Federal courts. By rule, adopted by the Circuit court for the district of Illinois, more than forty years ago, it was specially provided that it should be sufficient for a plaintiff in ejectment to describe a whole tract of land, and that he might, under such allegation, recover any part less than the whole, either divided or undivided, and that rule and practice prevailed when the present action was commenced.

The act of Congress cited by counsel, which adopted the practice of the State where the court was held, was passed June 1, 1872, and it is not necessary to consider what would be the effect of that act in case there had been no further legislation on this subject in Illinois. At the time this suit was brought the practice of the act cited in force was that of March 20, 1872, and that, by the act of Congress of June 1, 1872, was the rule prevailing in the Federal court. I might admit, for the purpose of argument, that when the declaration was

filed, or when the act of Congress of June, 1872, was passed, the plaintiff, under a claim of the whole, could not recover an undivided share, for, if such was the fact, it would only have required an amendment or an additional count to be made any time prior to the trial. As the law existed when the case was tried, such an amendment was unnecessary, and it would have been superfluous and absurd to have made it. No such point was considered in the court below. It is purely an afterthought to escape the manifest error of the court below.

Deed from Starr to Cabanne.

The counsel for defendants claim that an objection to reading a deed in evidence for the reason that "it is not proved or acknowledged according to law," is too general to base an error upon. I cannot see how such an objection could be more specific. When a deed is offered, the party producing it must prove the execution, unless it is waived; and this may be done by silence, or a general objection to the deed without indicating that it is for the want of proof of execution, or by an express waiver. But when the specified ground of objection is that the execution is not proved, the party offering must prove the execution by proper evidence. This is done when the signature of grantor or witness is proved according to the course of the common law, or by an acknowledgment in pursuance of a statute, which stands as a substitute for primary evidence.

The objection in this case went further, and specified that the deed was not "acknowledged according to law." The defendant was thereby notified, in the most distinct terms, that evidence must be produced to prove the execution of the deed. He relied upon an apparent acknowledgment or cer-

tificate attached to the deed. If this is sufficient, the objection was not; if insufficient, the court erred in admitting the deed.

The counsel for the defendant cites a territorial Act of 1807 in regard to the acknowledgment by sheriffs and other officers making execution sales, and says: that such a mode seems to have been in vogue at the time this deed was executed; and also refers to a case in Breese founded on the same statute.

The conclusive answer to this position is, that the statute of 1807 was repealed by an Act of March 30, 1819, as cited on page five of the argument for the plaintiff in error. It is also apparent that the provision of the Act of 1807 never did apply to deeds made by commissioners, acting under a decree in chancery, but only to sales under executions at law.

The reference to the repealed Act, gives some explanation of the certificate appended to this deed. Whatever may have been the views entertained at the time it was made, it is very certain that such a mode of acknowledgment was not justified by any existing statute.

There is no ground for the proposition, that the foreclosure was complete under the decree without a sale and deed, but it is unnecessary to add any thing to the argument on that point.

III.

The Defence under the Foreclosure Proceedings.

The decision of Logan v. Williams by the Supreme court of Illinois, on the question of jurisdiction.

The counsel for the defendants, in a supplemental brief,

presents an opinion of the Supreme court of Illinois, filed since the first argument was printed. This late opinion, on the first impression, seems to be conclusive of the question of jurisdiction in this identical case. But it is not. It is true, that the foreclosure proceedings before the Supreme court of Illinois are the same as those now in this record, except that the bill in the case was not before the court, because for many years it had been mislaid. In the absence of the bill, the court might well presume that the bill made Susan, Charles, James William and Helen O'Hara parties; and that a notice in pursuance of the order was given to them. When the bill is produced, and it is seen that these persons, the owners of the equity of redemption, were not made parties, such presumption is overthrown, and also the further presumption that the notice was given in accordance with the record. An examination of the opinion in *Logan v. Williams* will also show that the question we now make, that the owners of the equity of redemption could not be made parties by the general description of children and heirs of William M. O'Hara, was not presented to or decided by the court.

It is admitted that the question of acknowledgment of the mortgage was decided in the opinion perused, and that on the facts presented by the recorded orders and decrees, independent of the bill, that the court holds that nothing appears maintaining the jurisdiction of the court. But the question as to the acknowledgment of the deed from Starr to Cabanne, or as to the jurisdiction of the court on the facts presented in this record, were not considered or decided, and therefore the opinion in question lays down no rule for the guidance of this court.

The counsel for the defendants in discussing the question

of presumption of payment of mortgage, refers to the fact that the heirs of O'Hara were non-residents of Illinois, and cites the Illinois statutes of Limitations to show that an action for debt was not barred for that reason.

The answer is, that there never was a cause of action against the heirs in the State of Illinois, but there was one in Missouri, where they resided, and where the mortgagee also lived. The only cause of action in Illinois was the right to resort to its courts, to foreclose the equity of redemption in the mortgaged lands. The mode of proceeding in Missouri was to prove the demand against the estate of William M. O'Hara, or to bring an action at law against his heirs. Therefore it is immaterial what the limitation law of Illinois was, but it is quite important to determine the limitation laws of Missouri; and it is not denied that both forms of recovery were barred in that State.

The counsel also claims that there was not a transcript of the proceedings of the Probate court of Missouri offered in evidence. That is true, and it was unnecessary because it was proved that O'Hara resided and died in Missouri, leaving his family and property there. The court will presume that there was a settlement of his estate according to the laws of the only place where it could be had, especially after the lapse of fifty years.

It cannot be fairly claimed that there was any presumption of payment of the debt by a sale under the decree of the foreclosure, because there was either no sale known to the court or one proved by the proceedings and commissioner's deed admitted in evidence; and by the latter it appears that the entire property was sold for about $320, while the debt fixed by the decree was over $5,000.

IV.

Conclusion.

The counsel for defendants asserts that the judicial proceedings in this case, had been acquiesced in for more than fifty years; that the land had been occupied under them in good faith, and that the title had been sold for value, resting upon the belief that such proceedings were valid. This record affords no ground for such assertions, nor are they true as a matter of fact. It is true, that portions of this title in regard to one of the tracts of land described in the mortgage, was in the record of *Morrill v. Cone*, 22 How. 75, and in that of a similiar case of *Williams v. Merritt*, 23 Ill. 623. Those cases show that Morrill claimed to be the owner of the land by a deed made from the grantor of O'Hara, and that O'Hara himself derived no title, and therefore those claiming under him had no title. It so happened, in the cases cited, that the defendant claimed under a foreclosure proceeding, and as the only question in the case was in regard to Morrill's title as against O'Hara, no points were raised, discussed or decided as to the title between those claiming under the mortgage and O'Hara. As a matter of fact, it is true, that title to these lands has never been considered and settled, and has not to this day. In this case, it appears, that defendants had possession of the land in 1857 under a title adverse to that now set up by them under the mortgage, and, in 1861, they took, for a nominal consideration, a quit claim deed from five-sevenths of the heirs of the mortgagee, and they added such claim as existed under the mortgage to their prior title of the land. There is no evidence to show that such title was ever relied upon by them, or by anybody else.

I insist that the defendants' title was not made out through

the foreclosure proceedings, because the decree of the foreclosure was void for want of jurisdiction of the persons of defendants, and because the deed from Starr to Cabanne was not acknowledged or proved. We also insist that a defence was not made out under the mortgage, from the hypothesis that it had not been foreclosed as to the entire tract, because the defendants only held five-sevenths of such title, and because there was a failure on the part of the court to properly submit the question of payment of the mortgage to the jury.

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Bulletin Printing Co., 132, 134 and 136 Monroe Street, cor. Clark.